TABLE OF APPENDICES

The EC and ten of its Member States, as well as the Departments of the Republic of Colombia, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, on remand, is reported at 424 F.3d 175 (App. A, *infra*, 1a-14a). The opinion of this Court vacating the judgment of the Court of Appeals is reported at 125 S. Ct. 1968 (App. B, *infra*, 15a). The first opinion of the Court of Appeals is reported at 355 F.3d 123 (App. C, *infra*, 16a-45a). The opinion of the District Court dismissing the smuggling claims is reported at 150 F. Supp. 2d 456 (App. D, *infra*, 46a-76a). The District Court amended its judgment (App. E, *infra*, 77a-79a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 2004. On remand, the opinion and judgment of the Court of Appeals were reinstated on September 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) or, alternatively, 28 U.S.C. § 1651.

STATEMENT OF THE CASE

For the first time, the European Community and ten of its then fifteen Member States joined together to commence a civil action in a United States court. They brought this action to enjoin and deter tortious conduct, committed by U.S. defendants on U.S. soil, that facilitates and expedites ongoing schemes to smuggle cigarettes. In light of the seriousness of

the problem, and the location of the tortious conduct, the EC and its Member States took the necessary step of pursuing this civil case in the courts of the United States. The U.S. courts are empowered and uniquely well-situated to enjoin conduct within U.S. borders which, as alleged in detail and demonstrated in the courts below, fuels organized crime and narcotics trafficking, supports rogue states, and finances terrorist groups.

The Departments of the Republic of Colombia seek similar relief and have made a powerful case that cigarette smuggling schemes — directed and managed from the United States — facilitate narcotics trafficking and terrorism in Colombia.

These are not actions to collect unpaid foreign taxes from tax debtors. These actions were brought under U.S. domestic common law to enjoin and deter tortious domestic conduct that poses a continuing threat to Petitioners and the United States.

The Complaint of the EC and Ten Member States

The EC and ten of its then fifteen Member States asserted common law claims sounding in fraud, public nuisance, unjust enrichment, negligence, and negligent misrepresentation that are predicated on diversity jurisdiction.[3] The Complaint alleged

3. The Amended Complaint of the EC and Member States is included in the Joint Appendix in the Court of Appeals. C.A. App. 309-509. *See also* EC and Col. C.A. Br. at 10-18. The Amended Complaint seeks several forms of relief under statutory, common law and equitable theories including common law claims for damages and injunctive and other equitable relief; and civil RICO claims for (Cont'd)

that U.S. tobacco companies knowingly sold cigarettes to smugglers and, *indeed, directed and managed cross-border* smuggling schemes. The tobacco companies' domestic tortious conduct caused, and continues to cause, substantial harm to the EC, the Member States, and their citizens, as well as to the United States.

The Complaint of the Departments of the Republic of Colombia

The Departments of the Republic of Colombia are the functional equivalent of the states of the United States and they separately brought suit to enjoin and deter the tobacco companies' domestic conduct that facilitates and expedites smuggling activities.[4] In this action, it is alleged that the tobacco companies, particularly the BAT Group and Brown & Williamson, caused their products to be smuggled into Colombia, fueled narcotics trafficking, and facilitated organized crime in the United States and Colombia — all to the detriment of the Departments. The BAT Group (including

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(Cont'd)
damages and injunctive relief. A main focus of this action is to seek injunctive and other equitable relief to enjoin and deter domestic tortious conduct and, therefore, this petition will focus upon such claims.

4. The Second Amended Complaint of the Departments of the Republic of Colombia is included in the Joint Appendix in the Court of Appeals. C.A. App. 1931-2089. *See also* EC and Col. C.A. Br. at 18-24. As in the *EC* case, the Second Amended Complaint seeks several forms of relief under statutory, common law and equitable theories. *See supra* n.3. A main focus of this action is to seek injunctive and other equitable relief to enjoin and deter domestic tortious conduct and, therefore, this petition will focus upon such claims.

B&W) directed and controlled every aspect of the smuggling operation into Colombia, including selection of customers, setting prices for the products, controlling the supply of products to the smugglers, and regulating the smuggled market by granting or denying favorable financing terms. In the 1990s, ninety-five percent of BAT products sold in Colombia were smuggled.

Petitioners' Common Law Claims for Injunctive and Other Equitable Relief

The Complaints set forth five claims, under U.S. domestic common law, for which the Petitioners seek injunctive and other equitable relief:

Public Nuisance. The defendants' activities constitute and contribute to a public nuisance. C.A. App. 487-492, 2074-2077. The defendants facilitated the smuggling of cigarettes by means of a variety of acts and omissions conducted in or directed from the United States, including, for example, selling cigarettes into smuggling channels and managing smuggling schemes in a manner that facilitated organized crime on a massive scale; creating secret payment mechanisms for smugglers; providing marketing information to smugglers; falsely stating the value and destination of the products; imposing record-keeping requirements on the smugglers to allow defendants to monitor and direct the smuggling schemes; failing to act reasonably when put on notice of involvement with smugglers; and conspiring with third parties to smuggle products. The defendants' conduct created a public nuisance because it substantially and unreasonably interfered with, offended, injured and endangered the public health, morals, safety, convenience and well-being of the general public and operation of the market for tobacco products.

Unjust Enrichment. The defendants were unjustly enriched through their schemes. C.A. App. 492-495, 2078-2079. The defendants conspired with third parties to commit tortious acts and smuggle cigarettes into the European Community, the Member States, and the Republic of Colombia. "[T]he receipt and retention of the money derived from smuggling operations are such that, as between Plaintiffs and Defendants, it is unjust for Defendants to retain [such proceeds]." C. A. App. 494, 2079.

Common Law Fraud. The defendants falsified documents to mislead the Petitioners as to the destination of the smuggled cigarettes, provided false information, and concealed material information. C. A. App. 483-486, 2071-2074.

Negligence. The defendants owed a duty of reasonable care to refrain from causing foreseeable loss to the plaintiffs. C.A. App. 495-499, 2079-2082. Among other things, the defendants negligently failed to "terminate sales of their tobacco products to or through persons or entities known to be engaged, directly or indirectly, in smuggling" and failed to "comply with federal and state statutes and the standards of care reflected therein." C.A. App. 497, 2080. Defendants also failed to "produce, market and distribute their cigarette products lawfully and with due care," or otherwise "use proper practices and procedures in the hiring, selection, approval, instruction, training, supervision, and discipline of employees and agents engaged in the production, marketing and distribution of their products, some of whom the defendants knew, or reasonably should have known, were assisting and otherwise engaged in the smuggling of cigarettes." C.A. App. 496, 2080.

Negligent Misrepresentation. The defendants made misrepresentations to the Petitioners concerning the payment and value of cigarettes, the tobacco companies' activities, the destination of cigarettes, and the nature, extent, and causes of smuggling. This conduct amounts to a fraud on the plaintiffs and a fraud on the public. C.A. App. 500-502, 2083-2085.

For each of the above claims, the Complaints seek "Common Law Injunctive and Equitable Relief" including, among other things, prohibitory and mandatory injunctions and disgorgement of ill-gotten gains. C.A. App. 417-20, 2024-2026. Petitioners request an order enjoining the defendants and their co-conspirators from "selling cigarettes to smugglers or to distributors who sell cigarettes to smugglers or otherwise engaging in conduct that violates any common law, statutory or equitable standard." C.A. App. 418, 2024. The Complaints seek injunctive relief to end the tobacco companies' management of cross-border smuggling schemes. The injunctive relief would not apply, execute or enforce foreign tax law; it is predicated solely on U.S. domestic "common law, statutory, and equitable standard[s]" (C.A. App. 418, 2024) and seeks to enjoin and deter tortious conduct occurring in the United States.

Proceedings in the District Court

The tobacco companies moved to dismiss the Complaints, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the basis of the "revenue rule." App. 49a.

During the course of the proceedings in the District Court, the District Judge enquired whether the smuggling alleged in the Complaints was linked to terrorism. In

response, the EC and Member States, as well as the Departments, submitted evidence linking the misconduct alleged in the Complaints to terrorism. *See* EC and Col. C.A. Br. at 24-26.

The EC demonstrated, for example, that since August 1999, approximately 570,000 master cases (or 5.7 billion cigarettes) of RJR-brand cigarettes were distributed to Iraq. RJR's scheme to ship cigarettes from the United States, through the ports of the EC and into Iraq, involved the Kurdistan Workers' Party, the PKK. The PKK is considered by the United States to be a foreign terrorist organization, and has been placed on the EC's list of proscribed persons and entities. The Iraqi scheme was conducted with the complicity of the former regime of Saddam Hussein and for its benefit. In a separate submission, the Departments demonstrated the relationship between cigarette smuggling and terrorism. *See* EC and Col. C.A. Br. at 24 n.8.

On February 19, 2002, the District Court granted the motions to dismiss the Complaints. App. 46a-76a. Applying the Second Circuit's broad "version" of the revenue rule (App. 51a-54a), the District Court dismissed the "smuggling" claims with prejudice. The District Court dismissed the heart of this case — claims for injunctive relief under U.S. domestic common law — even though these claims do not seek unpaid foreign taxes from a tax debtor.

The District Court treated the revenue rule as akin to a jurisdictional bar and not as an "abstention doctrine." App. 51a-52a & n.1. The District Court held that the revenue rule is a mandatory "federal rule of common law" that divests courts of the power and "discretion" to entertain "smuggling" claims. App. 51a-52a & n.1.

Proceedings in the Court of Appeals

On January 14, 2004, the Second Circuit affirmed, in relevant part, the judgment of the District Court dismissing the Complaints under Fed. R. Civ. P. 12(b)(6), and barred the "smuggling" claims under the "revenue rule." App. 16a-46a. The Court of Appeals felt that its decision was compelled by its prior decision in *Attorney General of Canada v. R.J. Reynolds Tobacco Co.*, 268 F.3d 103 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002) ("*Canada*"). App. 31a. According to the Second Circuit, *Canada* "foreclosed" all of the "smuggling" claims in this case. App. 39a. *Canada*, however, did not extend the revenue rule to claims for injunctive relief under domestic common law; moreover, *Canada* applied the revenue rule in a limited manner to encompass claims for certain forms of money damages (specifically, "lost tax revenue" and related "law enforcement costs"). *See Canada*, 268 F.3d at 105-06. In the instant case, in contrast, the Court of Appeals took the unprecedented step of extending the revenue rule beyond the holding in *Canada* to bar claims for injunctive relief brought under U.S. common law to enjoin tortious conduct allegedly committed in the United States by U.S. companies.

The Second Circuit affirmed the dismissal of the Petitioners' claims for injunctive and other equitable relief under U.S. common law with virtually no discussion. App. 42a. For example, without reference to the Complaints, the Second Circuit held that the claims for injunctive relief under domestic common law have the "same implications as plaintiffs' claims for damages" and are "barred by the revenue rule." *Id.* This holding is both unprecedented and erroneous.

The Second Circuit affirmed the District Court's holding that the revenue rule is not a discretionary abstention doctrine. In holding that the courts "may not" entertain smuggling claims (App. 43a), the panel concluded that the federal courts lacked the power or "discretion" to "order the defendants to cease their smuggling operations" or otherwise deter such schemes. App. 42a-43a. The Court of Appeals did not cite any authority for this holding and, indeed, it is contrary to settled law.

One panel member, Judge Guido Calabresi, voiced his belief that *Canada* was "wrongly decided." App. 31a n.4. Nonetheless, he concurred with the panel's ruling on the basis of *stare decisis*. *Id.* In *Canada*, Judge Calabresi had filed a dissent stating that the revenue rule had no application to a civil claim predicated on the "domestic law" of the United States. *See Canada*, 268 F.3d at 136 (Calabresi, J., dissenting).

Petition for a Writ of Certiorari (No. 03-1427)

On April 12, 2004, the EC, ten of its then fifteen Member States, and the Departments of the Republic of Colombia filed a petition for a writ of certiorari. *See* Petition, 2004 WL 831362 (U.S.) (No. 03-1427). The petition presented one question for review: "Whether the Court of Appeals erred in extending the 'revenue rule' to bar claims brought under U.S. domestic law seeking equitable relief to enjoin and remedy smuggling schemes based in the United States." *Id.* at i. This Court held the petition pending the outcome in *Pasquantino v. United States*, No. 03-725.

Pasquantino v. United States

In *Pasquantino*, on April 26, 2005, this Court addressed the scope of the revenue rule and declined to follow the Second Circuit's reasoning in *Canada*. This Court recognized that, in modern times, the courts have applied the revenue rule in "traditional" circumstances, to bar claims seeking to recover unpaid foreign taxes from tax debtors. This Court ruled that the revenue rule does not apply to an action, predicated on *domestic* law (like the wire fraud statute), that addresses *domestic* conduct, in order to vindicate a substantial *domestic* interest in combating fraud. *Pasquantino*, 125 S. Ct. at 1775-77. This Court determined that the revenue rule does not bar "indirect" or "attenuated" or "incidental" enforcement of foreign tax laws, such as may occur in cases brought under domestic law. *Id.* at 1777-78. "[T]he revenue rule never proscribed all enforcement of foreign revenue law." *Id.* at 1778.

This Court Vacated the Second Circuit's Judgment: "GVR" Order

Following submission of Supplemental Briefs by the parties, this Court granted the initial petition in this case:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Pasquantino v. United States*, 544 U.S. __ (2005).

See European Community v. RJR Nabisco, Inc., 125 S. Ct. 1968 (2005). In according the petition "GVR" treatment, this Court, consistent with its stated practice, effectively

concluded that *Pasquantino* was an "intervening development" giving rise to a "reasonable probability" that the Second Circuit's decision "rests upon a premise" that the Second Circuit "would reject if given the opportunity for further consideration," and "such a redetermination may determine the ultimate outcome of the litigation." *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996). This Court entered its Judgment in this case on June 3, 2005.

Proceedings in the Court of Appeals on Remand

On remand, the Second Circuit "reinstated" its prior decision (App. 3a, 7a, 14a), holding that "*Pasquantino* casts no doubt on the reasoning or result in *EC I*." App. 14a. Without reference to the pleadings or the record, the panel aggregated and recharacterized the dozens of claims in the Complaints, labeling the entire case as one "to collect tax revenue" that is "barred under any of the available formulations of the revenue rule." App. 13a. With virtually no discussion, the Second Circuit reinstated its previous decision to affirm the District Court's dismissal of the claims for injunctive and other equitable relief under U.S. common law. App. 14a n.10. Without comment, the panel denied Petitioners' requests to remand the case to the District Court for a claim-by-claim analysis and the exercise of discretion, to amend the pleadings, to consider the evidence, and to have full briefing and oral argument. Judge Calabresi expressed his continuing view that *Canada* was "wrongly decided." App. 7a n.6.

REASONS FOR GRANTING THE PETITION

This is not a tax collection case. The defendants are not alleged to be tax debtors. The defendants are not alleged to have violated foreign law. This case falls outside the purview of the revenue rule.

This *is* a case to enjoin and deter domestic conduct of the most serious nature, which facilitates organized crime, narcotics trafficking and terrorism. The Second Circuit's unprecedented decision to extend the judge-made revenue rule to immunize such conduct raises an issue of national significance — whether the U.S. courts are powerless to *enjoin* domestic conduct that poses an ongoing threat to the Petitioners and the United States. The decision below warrants review and summary reversal by this Court for two reasons.

First, the Second Circuit failed to comply with this Court's mandate and *Pasquantino*. The Second Circuit did not follow the majority opinion in *Pasquantino* (which had declined to follow the Second Circuit's reasoning in *Canada*). Instead, it applied the standards embodied in Part I of the *dissenting* opinion in *Pasquantino* (which had embraced the Second Circuit's reasoning in *Canada*). Applying an incorrect legal standard, the Second Circuit reached an incorrect result. It used the revenue rule to bar claims that do *not* seek recovery of unpaid foreign taxes from a tax debtor, such as claims for injunctive relief under *domestic* common law to enjoin *domestic* conduct committed by *domestic* companies. This decision conflicts with this Court's mandate (as set forth in the GVR Order of May 2, 2005), *Pasquantino*, the decisions of the Fourth and Ninth Circuits, the decisions of the highest courts of the United Kingdom, Canada, and Ireland, and the Restatement (Third) of Foreign Relations Law § 483 (1987). Finally, the Second Circuit misapprehended the claims as pled and imputed to Petitioners claims that were never made. The Second Circuit has extended the revenue rule in an unprecedented manner.

Second, the holding of the Court of Appeals, that the revenue rule is akin to a jurisdictional bar and is not a discretionary abstention doctrine, conflicts with the decisions

of this Court, the Fourth and Eleventh Circuits, the House of Lords, and the Restatement (Third) of Foreign Relations Law § 483 (1987). The District Court and the Court of Appeals held that the revenue rule is a mandatory rule that divests the federal courts of their equitable power and discretion in this case. This view is contrary to settled, modern law recognizing that domestic courts are open, and should remain open, to the equitable claims of foreign States. The Second Circuit effectively has converted a discretionary rule of abstention into a jurisdictional bar and has closed the courts to the equitable claims of the Petitioners in this case.

I. THE SECOND CIRCUIT FAILED TO COMPLY WITH THIS COURT'S MANDATE AND *PASQUANTINO*

On remand, the Second Circuit was bound to follow this Court's mandate, as reflected in this Court's GVR Order of May 2, 2005. *See, e.g., Gulf Refining Co. v. United States*, 269 U.S. 125, 135 (1925) ("the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length"); *Rogers v. Hill*, 289 U.S. 582, 587 (1933) (same). A court addressing a case on remand must act "scrupulously" to ensure that the mandate is "fully carried out." *United States v. E.I. Du Pont de Nemours & Co.*, 366 U.S. 316, 325 (1961).

Summary reversal is appropriate to correct a lower court's failure to heed this Court's guidance in the form of a GVR order. *See, e.g., Rhodes v. Stewart*, 488 U.S. 1, 3 (1988) (*per curiam*) (summarily reversing decision on remand from GVR where Court of Appeals had "misapprehended our holding"); *Powell v. Texas*, 492 U.S. 680, 681 (1989) (*per*

curiam) (summarily reversing where, on remand from GVR, state court reinstated its prior decision on waiver rationale); *INS v. Miranda*, 459 U.S. 14, 19 (1982) (*per curiam*) (summarily reversing where Court of Appeals distinguished decision forming basis for GVR in a way that was "unpersuasive"); *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982) (*per curiam*) (summarily reversing Court of Appeals' decision on remand from GVR where "the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress"); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970) (*per curiam*) (summarily reversing where, on remand from GVR, Court of Appeals reaffirmed prior decision to deny standing). *See Sumner v. Mata*, 455 U.S. 591, 596-97 (1982) (*per curiam*) (granting certiorari and vacating where the Court of Appeals on remand "reinstated" its prior conclusion, followed the "dissenting opinion" in the prior case before this Court, and "apparently misunderstood the terms of [this Court's] remand").[5]

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5. When an order issued by a lower court that takes the form of an appealable order fails to comply with this Court's mandate, "the aggrieved parties may file the ordinary petition for certiorari." R. Stern, E. Gressman, S. Shapiro & K. Geller, SUPREME COURT PRACTICE 585 (8th ed. 2002). Because the present case was "in the court of appeals," it falls clearly within the Court's certiorari jurisdiction under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 241-42 (1998). There is thus no jurisdictional impediment to bringing the Second Circuit into compliance with the mandate of May 2, 2005, by granting certiorari and reversing the Court of Appeals' judgment. *See Perkins v. Fourniquet*, 55 U.S. 328, 330 (1852). In an abundance of caution, however, Petitioners also request (in the alternative) that the Court, if necessary, construe this petition as one for a writ of mandamus under 28 U.S.C. § 1651. *See United States v. Fossatt*, 62 U.S. 445, 446 (1858) ("And if the

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A. *Pasquantino* Superseded the Second Circuit's Reasoning and Result

On remand, the Second Circuit held that "*Pasquantino* casts no doubt on the reasoning or result in *EC I*." App. 14a. This conclusion is not supportable. The Second Circuit's decision to reinstate a decision directly at odds with *Pasquantino*, and effectively follow the dissent in *Pasquantino*, fails to comply with this Court's mandate and *Pasquantino*.

1. This Court Supplanted the Second Circuit's Definition of the Revenue Rule

In *Canada*, the Second Circuit adopted a "version of the revenue rule under which United States courts abstain from assisting foreign sovereign plaintiffs with extraterritorial tax enforcement." *Canada*, 268 F.3d at 128. Its "version" was grounded upon the view that, under U.S. tax treaties, "the political branches of our government have *clearly expressed* their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *Id.* at 119 (emphasis added).[6]

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court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time, bring the errors or omissions of the inferior court before this court for correction"); Stern *et al.*, SUPREME COURT PRACTICE, *supra*, at 585 ("One function of the writ of mandamus is to force a lower court to comply with the mandate of an appellate court").

6. On remand, the Second Circuit stated that U.S./Canada tax treaties "hardly formed the basis of the opinion in *Canada*." App. 13a n.9. However, *Canada* itself repeatedly emphasized that its result was based on the specific facts and context of the case, particularly these tax treaties. *See, e.g.*, *Canada*, 268 F.3d at 113, 125.

This "version" of the revenue rule was the centerpiece of the *Canada* opinion (*id.* at 115, 119, 128), and it was specifically applied to bar the "smuggling" claims in this case. App. 51a; *see also* App. 7a, 14a.

Pasquantino recognized that modern courts have applied the revenue rule in "traditional" circumstances, where the claim seeks to collect an unpaid foreign tax debt from a tax debtor. *Pasquantino*, 125 S. Ct. at 1775 (claims for "the collection of tax obligations of foreign nations"); *id.* (claims for "collection of foreign tax claims"); *id.* (enforcement of a "'tax judgment'") (citation omitted); *id.* ("a suit that recovers a foreign tax liability, like a suit to enforce a judgment"). *Accord Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 272-75 (1935) (the revenue rule is implicated, if at all, only in "a suit to recover taxes due to another [government] or upon a judgment for such taxes" under foreign law that would cause the courts "to scrutinize the relations of a foreign state with its own citizens").

This Court considered, debated, and squarely declined to follow *Canada*'s expansive view of the revenue rule. Specifically addressing *Canada*, this Court held that "U.S. tax treaties" and the "antismuggling statute" do not limit the reach of otherwise applicable domestic law, such as the wire fraud statute. *Pasquantino*, 125 S. Ct. at 1773. In contrast, Part I of the dissent advocated the broad version of the revenue rule established in *Canada*, stating: "Congress has actively indicated, through both domestic legislation and treaties, that it intends 'strictly [to] limit the parameters of any assistance given' to foreign nations." *Pasquantino*, 125 S. Ct. at 1785 (Ginsburg, J., dissenting) (quoting *Canada*).

On remand from this Court, the Second Circuit did not follow *Pasquantino*. The Second Circuit effectively followed the dissent in *Pasquantino*. The Court of Appeals achieved this result by reaffirming *Canada*'s (and *EC I*'s) overly broad approach to the revenue rule — an approach that was embraced only by Part I of the dissent in *Pasquantino*. The Second Circuit's reaffirmation of *Canada* — in the face of *Pasquantino's* decision not to follow *Canada*'s expansive view of the revenue rule — directly conflicts with this Court's mandate and the majority view in *Pasquantino*. Under these circumstances, summary reversal is appropriate. *See Sumner*, 455 U.S. at 596 (summarily reversing Court of Appeals' decision that followed the "dissenting opinion" in the case previously before this Court).

This Court's decision not to follow *Canada* was not, as the Second Circuit asserted on remand, an inconsequential "passing comment." App. 13a n.9. *Pasquantino*'s rationale is to be accorded the utmost respect because, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996). *See also County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law"); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring) ("Although technically dicta, * * * an important part of the Court's rationale for the result [that] it reache[s] * * * is entitled to greater weight").

2. This Court Supplanted the Second Circuit's Reasoning

On remand, the Second Circuit did not take account of the following elements of *Pasquantino*:

- This Court held that the revenue rule "has . . . always been unclear" and "uncertain[]" in scope. *Pasquantino*, 125 S. Ct. at 1778. On remand, the Second Circuit restated its contrary view that the revenue rule is "long-standing." App. 7a. This perpetuates the basic error in *Canada*, in which the Second Circuit considered the revenue rule to be a "centuries-old" (*Canada*, 268 F.3d at 134), and clearly understood, doctrine. *Id.* at 130.

- This Court held that whether a claim is based on U.S. "*domestic*" law is directly relevant to a revenue rule analysis. *Pasquantino*, 125 S. Ct. at 1776 (emphasis in original). On remand, the Second Circuit reinstated its mistaken view that the "domestic" legal basis of a claim is irrelevant to a revenue rule analysis. App. 40a n. 8; App. 13a.

- This Court held that "indirect" or "incidental" or "attenuated" assistance in foreign tax matters, such as may occur in connection with claims brought under domestic law, is permissible. *Pasquantino*, 125 S. Ct. at 1775-77. On remand, the Second Circuit reinstated its contrary view that the revenue rule bars claims that are said to "indirectly" assist foreign governments in tax matters. App. 7a, 12a; App. 27a-28a.

- This Court held that the "domestic" nature of the fraudulent conduct underlying the claim weighs against application of the revenue rule. *Pasquantino*, 125 S. Ct. at 1777. On remand, the Second Circuit reinstated its contrary view that the "operation of the [revenue] rule does not depend on the type of conduct alleged." App. 32a.

- This Court held that claims under domestic law addressing domestic conduct serve to enforce *domestic* law, not foreign law. *Pasquantino*, 125 S. Ct. at 1775-77. Despite this holding, the Second Circuit, on remand, continued to hold that claims under domestic law seeking to enjoin domestic conduct are categorically barred as "extraterritorial[]" efforts to enforce foreign tax laws. App. 14a n.10.

In sum, the Second Circuit plainly erred in concluding on remand that "*Pasquantino* casts no doubt on the reasoning or result in *EC I*." App. 14a. The Second Circuit's decision to reinstate an opinion at odds with the majority in *Pasquantino* (and effectively follow the *dissent* in *Pasquantino*) conflicts with both this Court's mandate and *Pasquantino*. Review and summary reversal of the judgment below are warranted.

3. The Second Circuit's "Version" of the Revenue Rule Conflicts With the Decisions of the Fourth and Ninth Circuits and Other Authorities

The Second Circuit's overly broad "version" of the revenue rule conflicts not only with *Pasquantino*, but it also conflicts with the decisions of the Fourth and Ninth Circuits. *See United States v. Pasquantino*, 336 F.3d 321, 329 & n.3 (4th Cir. 2003) (*en banc*) (revenue rule only "pertains to the nonenforcement of foreign tax judgments as opposed to the nonrecognition of foreign revenue laws"), *aff'd*, 125 S. Ct. 1766 (2005); *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1165 (9th Cir. 1979) (foreign tax judgment); *see also* Restatement (Third) of Foreign Relations Law § 483 (1987) (revenue rule does not require, but allows, courts to refuse enforcement of foreign tax judgments).

The Second Circuit's "version" of the revenue rule also conflicts with the decisions of the courts of Canada and Ireland, which this Court recognized in *Pasquantino*. *Peter Buchanan L. D. v. McVey*, [1955] A. C. 530, 533 (Ir. Sup. Ct. 1951) (Maguire, C.J.) (revenue rule implicated because "the *sole object* [of proceedings in Scotland] was to collect a revenue debt" but noting that "if the payment of a revenue claim was *only incidental* and there had been other claims to be met, it would be difficult for our courts to refuse to lend assistance") (emphasis added); *United States v. Harden*, [1963] S.C.R. 366, 372-73 (Can.) ("when it appears to the court that the *whole object* of the suit is to collect tax for a foreign revenue, and that this will be the *sole result* of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction") (emphasis added). *Accord State of Norway (Nos. 1 and 2)*, [1990] A.C. 723,

807-08 (H.L.) (revenue rule covers a "'claim for taxes'" and does not bar Norway's request for "assistance of the English courts" in obtaining evidence in a "fiscal" or tax case) (citation omitted).

The Second Circuit is thus out of step with settled law.

B. The Second Circuit Applied an Incorrect Legal Standard

On remand, the Second Circuit reinstated and applied its superseded version of the revenue rule. The Second Circuit's failure to apply the correct legal standard alone warrants review and summary reversal.

The Second Circuit's most prejudicial error was the application of its superseded legal standard to bar claims for injunctive relief under domestic law. In addressing these claims, the Second Circuit did not apply the revenue rule as recognized in *Pasquantino* and modern courts. Instead, the Court of Appeals applied its impermissibly broad version of the revenue rule as formulated in *Canada* and embodied in *EC I*. On remand, the Second Circuit incorrectly concluded in a footnote that the revenue rule bars the claims for "injunctive relief" because, in the panel's view, they "would have the effect of extraterritorially enforcing plaintiffs' tax laws." App. 14a n.10 citing *EC I*, 355 F.3d at 138.

The Second Circuit applied an incorrect legal standard and reached an incorrect result. A claim for injunctive relief under domestic law (against domestic defendants which are not alleged to owe foreign taxes) falls well outside the traditional ambit of the revenue rule. The Second Circuit overlooked this Court's view that claims under *domestic* law

addressing *domestic* conduct serve to enforce *domestic* law, not foreign tax law. *Pasquantino*, 125 S. Ct. at 1775-77. However formulated, the revenue rule was not designed to exempt domestic companies from domestic law, or deprive the courts of their power to enjoin tortious domestic conduct.

C. The Second Circuit Misapprehended the Claims as Pled

The Second Circuit not only applied an incorrect legal standard, but it also misapprehended the claims as pled in the Complaints, and indeed, imputed to Petitioners claims that were never made and were specifically disavowed.

On remand, the Second Circuit based its holding upon the premise that "the substance of the claim is that the defendants violated foreign tax laws." App. 14a. This premise is demonstrably incorrect. The Complaints allege violations of U.S. domestic law. As Petitioners made clear in their briefs before the Second Circuit:

> The factual predicate for application of the revenue rule is not present here because this is not "a suit to recover taxes due to another [government] or upon a judgment for such taxes" under foreign law that would cause the courts "to scrutinize the relations of a foreign state with its own citizens." *See Milwaukee County*, 296 U.S. at 272, 275; *see also* Restatement (Third) of Foreign Relations Law § 483 (1987). The smuggling claims are not "revenue claims" because *the Defendants themselves are not alleged to owe taxes. The duties and taxes generally are owed by the smugglers.* The tobacco companies'

> liability does not arise by virtue of "tax debtor" status under foreign law; rather, it arises under U.S. laws designed to eradicate and remedy racketeering activity.
>
> Even if some claims were considered to be "tax collection" claims, there is no basis to find, particularly on this record, that *all* of the claims in the complaint are "tax-collection" claims. The district court failed to consider each claim, its legal basis, the nature of the defendant, the manner of proof, and the relief sought. This failure resulted in the impermissible expansion of the revenue rule to "preempt" claims that do not involve, much less turn upon, foreign tax law.

EC and Col. C.A. Br. at 77-78 (emphasis added). *See also* EC and Col. C.A. Reply Br. at 14 n.6 ("Defendants' civil liability does not turn on foreign tax law; their civil liability is based upon conduct that is violative of U.S. statutory and common law . . .") (citation omitted).

The Second Circuit disregarded or overlooked the pleadings and Petitioners' representations to the Court. The panel imputed claims to Petitioners that were never made and which were, in fact, specifically disavowed by Petitioners. The panel then barred such reformulated claims under the revenue rule. The Second Circuit, in disregarding or overlooking the pleadings, and attributing to Petitioners claims that were never made, far exceeded the permissible scope of review under Fed. R. Civ. P. 12(b)(6). *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (complaint should not be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support

of his claim which would entitle him to relief"); *Dye v. Hofbauer*, 126 S. Ct. 5 (*per curiam*) (2005) (judgment of Court of Appeals summarily reversed where the court simply overlooked properly presented claim).

The Second Circuit's error was highly prejudicial. The Court of Appeals concluded, incorrectly, that the claims for injunctive relief under domestic common law sought merely to compel defendants to "obey [foreign] tax laws." App. 14a n.10. Petitioners never made such a claim. In fact, the Complaints plainly state that they seek to compel the defendants to comply with *U.S. domestic* "common law, statutory or equitable standard[s]," not foreign tax laws. *See, e.g.*, C.A. App. 418, 2024. The Complaints do not seek to collect unpaid taxes from defendants because, as noted above, "Defendants themselves are not alleged to owe taxes." EC and Col. C.A. Br. at 77. The claims for injunctive relief, as actually pled, should not be barred by the revenue rule.

On remand, Petitioners requested that the Second Circuit itself remand the case to the District Court, to allow a claim-by-claim review, particularly with respect to claims for injunctive and other equitable relief. The Second Circuit summarily denied this request without explanation, even though a claim-specific evaluation is clearly required. *See Pasquantino*, 125 S. Ct. at 1777 (courts conducting a revenue rule analysis should consider the "purpose" of the claim, the "domestic" nature of the "conduct," and the "interest" vindicated by the claim); *see also Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611, 2620 (2005) ("When the well-pleaded complaint contains at least one [cognizable] claim . . . the district court, beyond all question, has jurisdiction over that claim"); *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1352 (2d Cir.)

(Friendly, J.) (judgment granting motion to dismiss reversed in part; abstention doctrine barred claims seeking a particular form of damages, but not claims for injunctive relief and other forms of damages), *aff'd*, 476 U.S. 409 (1986).

In sum, the Second Circuit's decision to bar claims that were not made in the Complaints (and were explicitly disavowed by Petitioners), makes clear the need for further consideration by the District Court.

II. THE SECOND CIRCUIT'S DECISION – THAT THE REVENUE RULE IS AKIN TO A JURISDICTIONAL BAR AND IS NOT A DISCRETIONARY ABSTENTION DOCTRINE – CONFLICTS WITH THE DECISIONS OF THIS COURT, THE FOURTH AND ELEVENTH CIRCUITS, THE HOUSE OF LORDS, AND THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW

The District Court held that the "common law revenue rule" was not an "abstention doctrine," but rather, a mandatory "federal rule of common law" that divests federal and state courts of the power and "discretion" to entertain "smuggling" claims. App. 51a-52a & n.1. The Court of Appeals affirmed. In holding that the courts "may not" entertain the "smuggling" claims brought by Petitioners (App. 27a-28a), the Court of Appeals held that the courts lack the power or "discretion" to enjoin or deter domestic conduct that facilitates smuggling schemes and other serious wrongdoing. App. 42a-43a. On remand, the Court of Appeals reinstated this view, and summarily denied Petitioners' request to remand the case to the District Court for the exercise of discretion.

The Second Circuit's decision — that federal courts lack the equitable power or discretion to enjoin or otherwise address domestic conduct that facilitates a "smuggling" scheme — clearly conflicts with settled law. Even if the revenue rule were implicated by a particular claim, the revenue rule is a discretionary doctrine rather than a mandatory limit on the courts' jurisdiction. This Court, as well as the Fourth and the Eleventh Circuits, and the House of Lords, have held that the revenue rule is, at most, a discretionary abstention doctrine, pursuant to which a court may, "on the principle of comity," hear a case if appropriate, even if the case presents a foreign tax element. *See, e.g.*, *Milwaukee County*, 296 U.S. at 272 (revenue rule "is not rightly addressed to any want of judicial power in the courts" and is not a matter of "jurisdiction") (inter-state dispute); *Massachusetts v. Missouri*, 308 U.S. 1, 20 (1939) (same); *United States v. Pasquantino*, 336 F.3d 321, 329 (4th Cir. 2003) (*en banc*) (revenue rule is "permissive"), *aff'd*, 125 S. Ct. 1766 (2005); *id.* at 340 (Gregory, J., dissenting) ("revenue rule . . . is a discretionary doctrine"); *Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359, 1369 (S.D. Fla. 2002) ("the revenue rule is a rule of abstention"), *aff'd sub nom. Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003), *cert. denied*, 540 U.S. 1109 (2004); *see also* Restatement (Third) of Foreign Relations Law § 483 (1987) (revenue rule is discretionary, not mandatory); *State of Norway (Nos. 1 and 2)*, [1990] A.C. 723, 808 (H.L.) (revenue rule does not "go to the jurisdiction of the English court"; court "declines" jurisdiction as a matter of judicial discretion).

The Second Circuit's decision, to divest the federal courts of their historic power to entertain equitable claims brought by U.S. allies in this case, conflicts with settled law.

See, e.g., Republic of the Philippines v. Marcos, 862 F.2d 1355, 1364 (9th Cir. 1988) (*en banc*) (injunctive relief awarded to foreign State to preserve the possibility of equitable remedies); *see also United States of America v. Levy*, [1999] CarswellOnt 926 (Ont. Gen. Div.) (granting motion of the U.S. and FTC to trace and freeze assets connected to a telemarketing scheme); *Kingdom of Spain v. Christie Ltd.*, [1986] 1 W.L.R. 1120 (Eng. Ch. D.) (Spain stated an equitable cause of action arising from the smuggling of a Goya oil painting out of Spain based upon forged export documents); *Republic of Haiti v. Duvalier*, [1990] QB 202, 217 (Eng. C. A.) (affirming injunction sought by Republic of Haiti, holding "[t]his case demands international co-operation between all nations"); Statement of Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice, Hearing Before the U.S. Senate Special Committee on Aging, Medicare Enforcement Actions: The Federal Government's Anti-Fraud Efforts, Serial No. 107-11, at 49, 62 (July 26, 2001) ("In appropriate civil cases [in foreign courts], [the United States] can seek to shut down boiler rooms, enjoin con-artists from telemarketing into the United States, and freeze corporate and individual assets for eventual restitution to victims of the fraud").[7]

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7. Foreign courts have been open to foreign governments, including the United States, seeking injunctive and other equitable relief since at least the 19th century. *See United States of America v. Prioleau*, 2 H. & M. 559 (1865) (U.S. permitted to seek injunction and receiver to restrain and recover government property derived from taxes assessed by the Confederate States of America); *United States of America v. Wagner*, [1866-67] L.R. 2 Ch. App. 582, 584, 1866 WL 8317 (CA in Chancery) (U.S. sought an accounting and recovery of money and property; counsel observed that a suit instituted by the President of the United States was pending in

(Cont'd)

The legal issue of whether the revenue rule is a mandatory, rigid rule akin to a jurisdictional bar or a discretionary abstention doctrine warrants review by this Court. The Second Circuit has imposed an absolute bar on "smuggling" claims brought by foreign States in U.S. courts and has held that, regardless of the facts and circumstances, the federal courts are utterly powerless to entertain such claims in this case. The District Court did not exercise its discretion, and the Second Circuit held that the District Court had no discretion. This holding is contrary to settled law, and warrants review and reversal by this Court.

On remand from this Court, the Second Circuit should have granted Petitioners' request to remand the case to the District Court for a claim-by-claim review and the exercise of discretion. This is particularly true with respect to the claims for injunctive and other equitable relief, which invoke the discretionary power of the courts. *See Meredith v. Winter Haven*, 320 U.S. 228, 235-36 (1943). Where, as here, the Petitioners seek to *enjoin* domestic conduct that facilitates terrorism and other serious wrongdoing, it is entirely

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(Cont'd)

France); *King of Two Sicilies v. Willcox*, 1 Sim. (N.S.) 301 (1851) (King of Two Sicilies may seek equitable relief before the courts of England to recover proceeds of "Royal revenues"); *Emperor of Austria v. Day* (1861), 3 de G. F. & J. 217, 253 (1861) (Emperor of Austria may seek injunctive relief in the courts of England to restrain cross-border counterfeiting scheme; plaintiff is "entitled" to act to prevent "wrongful" and "civilly unlawful" conduct that harms "the public revenues, the fiscal resources [or] the pecuniary means of the realm") (per Knight Bruce, L.J.); *Hullet v. King of Spain*, 1 Dow & Clark 488, 491 (H.L.) (1828) (foreign sovereign is entitled to sue in the courts of England in equity; rejecting argument that an English court of equity should not be made instrumental in enforcing the prerogative of a foreign sovereign).

appropriate to allow the District Court to balance all relevant factors and entertain the case, even if a claim is said to incidentally advance the interests of a foreign State in tax matters.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Court of Appeals.

Respectfully submitted,

JOHN J. HALLORAN, JR.
Counsel of Record
JOHN F. SCHUTTY III
SPEISER, KRAUSE, NOLAN
& GRANITO
Two Grand Central Tower
140 East 45th Street
New York, NY 10017
(212) 661-0011

Attorneys for Petitioners

Of Counsel:

KEVIN A. MALONE
CARLOS A. ACEVEDO
KRUPNICK CAMPBELL MALONE
BUSER SLAMA HANCOCK
LIBERMAN & MCKEE

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED SEPTEMBER 13, 2005

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Docket No. 02-7325(L), 02-7330(CON), 02-7323

THE EUROPEAN COMMUNITY, Acting on its own behalf and on behalf of the Member States it has power to represent, and the Kingdom of Belgium, Republic of Finland, French Republic, Hellenic Republic, Federal Republic of Germany, Italian Republic, Grand Duchy of Luxembourg, Kingdom of the Netherlands, Portuguese Republic, and Kingdom of Spain, Individually,

Plaintiffs-Appellants,

v.

RJR NABISCO, INC., R.J. Reynolds Tobacco Co., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., RJR Acquisition Corp., f/k/a Nabisco Group Holdings Corp. and R.J. Reynolds Tobacco Holdings, Inc.,

Defendants-Appellees.

Department of Amazonas, Department of Antioquia, Department of Atlantico, Department of Bolivar, Department of Caqueta, Department of Casanare, Department of Cesar, Department of Choco, Department of Cordoba, Department of Cundinamarca, Department of Huila, Department of La Guajira, Department of Magdalena, Department of Meta, Department of Narino, Department of Norte De Santander, Department of Putumayo, Department of Quindio,

Appendix A

Department of Risaralda, Department of Santander, Department of Sucre, Department of Tolima, Department of Valle Del Cauca, Department of Vaupes and Santa Fe De Bogota, Capital District,

Plaintiffs-Appellants,

v.

Philip Morris Companies, Inc., Philip Morris Incorporated, d/b/a Philip Morris Products, Inc., Philip Morris Latin America Sales Corporation, Philip Morris Duty Free, Inc., British American Tobacco (Investments) Ltd., B.A.T. Industries, P.L.C., Brown & Williamson Tobacco Corporation, USA, Batus Tobacco Services, Inc. and British American Tobacco (South America) Ltd.,

Defendants-Appellees.

The European Community, Acting on its own behalf and on behalf of the Member States it has power to represent, and the Kingdom of Belgium, Republic of Finland, French Republic, Hellenic Republic, Federal Republic of Germany, Italian Republic, Grand Duchy of Luxembourg, Kingdom of the Netherlands, Portuguese Republic, and Kingdom of Spain, Individually,

Plaintiffs-Appellants,

v.

Japan Tobacco, Inc., JT International Manufacturing America, Inc., JTI Duty-Free USA, Inc., JT International S.A., Japan Tobacco International U.S.A., Inc. and Premier Brands, Ltd.,

Defendants-Appellees.

Appendix A

Argued: Jan. 29, 2003.
Decided: Sept. 13, 2005.

SOTOMAYOR, *Circuit Judge.*

This matter returns to us following a remand by the Supreme Court. *See European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir.2004) ("*EC I* "), *vacated and remanded by European Cmty. v. RJR Nabisco*, __ U.S. __, 125 S.Ct. 1968, 161 L.Ed.2d 845 (2005). Our previous decision held that civil suits brought by foreign sovereigns under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), to recover law enforcement costs and tax revenue lost to smuggling are barred by the revenue rule, under which United States courts generally may not interpret and enforce foreign revenue laws. *See EC I*, 355 F.3d at 127; *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir.2001) ("*Canada*"), *cert. denied*, 537 U.S. 1000, 123 S.Ct. 513, 154 L.Ed.2d 394 (2002). The Supreme Court vacated that decision and remanded for reconsideration in light of its decision in *Pasquantino v. United States*, __ U.S. __, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005), an opinion issued while plaintiffs' petition for a writ of certiorari in *EC I* was pending. *See European Cmty.*, 125 S.Ct. at 1968. We have considered *Pasquantino v. United States* and the parties' letter briefs concerning its impact on *EC I* and reinstate our decision in *EC I*.

Appendix A

BACKGROUND

Plaintiffs-appellants are the European Community ("EC") and various of its member states ("EC plaintiffs"), as well as certain Departments of the nation of Colombia (the "Departments of Colombia") (collectively, "plaintiffs").[1] This appeal arose from three actions that were treated as related and decided together by the district court. *See EC I*, 355 F.3d at 128. The plaintiffs made substantially similar allegations, sought the same damages, and relied on the same legal theories in their three complaints. *Id.* In two of the complaints, the EC plaintiffs alleged that tobacco companies directed and facilitated the smuggling of contraband cigarettes. *Id.* In a third complaint, the Departments of Colombia made similar allegations, claiming that tobacco companies directed and facilitated the smuggling of cigarettes into their country. *Id.*[2]

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1. The EC plaintiffs, in addition to the EC itself, are: the Kingdom of Belgium, the Republic of Finland, the French Republic, the Hellenic Republic, the Federal Republic of Germany, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, and the Kingdom of Spain. The Colombian plaintiffs are the following Departments: Amazonas, Antioquia, Atlantico, Bolivar, Caqueta, Casanare, Cesar, Choco, Cordoba, Cundinamarca, Huila, La Guajira, Magdalena, Meta, Narino, Norte De Santander, Putumayo, Quindio, Risaralda, Santander, Sucre, Tolima, Valle Del Cauca, Vaupes and Santa Fe De Bogota, Capital District.

2. A complete description of the allegations in the complaint may be found in our discussion in *EC I*, *see* 355 F.3d at 128, which we need not reprise here.

Appendix A

The plaintiffs claimed that the defendants had participated in a smuggling enterprise within the meaning of RICO and committed various predicate acts of racketeering, including mail and wire fraud, money laundering, and others. *Id.* at 128. The complaints all sought to recover treble damages, pursuant to RICO, for duties and taxes not paid on the cigarettes. They further sought to recover funds which they had been "required to expend . . . to fight against cigarette smuggling." *Id.* at 129. Finally, the complaints sought various forms of injunctive relief that would end the defendants' alleged smuggling and help ensure future compliance. *Id.* The district court dismissed all of the smuggling-related claims as barred by the revenue rule. *Id.*[3]

The plaintiffs appealed to this Court. We held that the revenue rule barred the foreign sovereigns' civil claims for recovery of lost tax revenue and law enforcement costs. *See* 355 F.3d at 127. We affirmed the judgment of the district court on the revenue rule question[4] and the plaintiffs filed a petition for a writ of certiorari from the Supreme Court. *See* 2004 WL 831362 (U.S. Apr.12, 2004) (No. 03-1427).

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3. The district court also dismissed certain money-laundering claims without leave to replead, which we found was not an abuse of discretion. *Id.* at 139. This part of our decision is not affected by *Pasquantino*, and we do not reconsider it here.

4. We affirmed the judgment of the district court in *European Community v. RJR Nabisco, Inc.*, 355 F.3d 123, and *Department of Amazonas v. Philip Morris Cos.*, No. 02-7325. The district court's judgment in *European Community v. Japan Tobacco, Inc.*, 2002 WL 32443614, was vacated and remanded for further proceedings consistent with our opinion, because the district court prematurely dismissed the action before an adverse party was joined. *See EC I*, 355 F.3d at 138.

While the petition was pending, the Supreme Court issued its opinion in *Pasquantino v. United States*, __ U.S. __, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005), a case dealing with the revenue rule's application to the criminal prosecution of smugglers under the wire fraud statute, 18 U.S.C. § 1343. In *Pasquantino*, the Supreme Court specifically declined to express a view as to "whether a foreign government, based on wire or mail fraud predicate offenses, may bring a civil action under [RICO] for a scheme to defraud it of taxes." 125 S.Ct. at 1771 n. 1. Not long after *Pasquantino* was decided, the Supreme Court vacated our judgment in *EC I* and remanded it to us for further consideration in light of *Pasquantino*. *See European Cmty. v. RJR Nabisco*, __ U.S. __, 125 S.Ct. 1968, 161 L.Ed.2d 845 (2005). We requested letter briefs addressing the impact of *Pasquantino*, which the parties provided. We now reconsider our decision in *EC I*.[5]

DISCUSSION

We are "bound by the decisions of prior panels until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.2004). We recognize an exception to this general rule "where there has been an intervening Supreme Court decision that casts doubt on our controlling precedent." *Union of Needletrades, Industrial & Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir.2003). The

5. On July 5, 2005, we granted a motion by the European Community plaintiffs for voluntary dismissal with prejudice only as to the Philip Morris appellees in *European Community v. RJR Nabisco, Inc.*, 355 F.3d 123. The RJR Nabisco appellees in that case, and all parties in the other cases, remain the same as in *EC I*.

Appendix A

Supreme Court has taken two relevant actions since *EC I*: its decision in *Pasquantino v. United States*, __ U.S. __, 125 S.Ct. 1766, 161 L.Ed.2d 619, and its order that we reconsider *EC I* in light of *Pasquantino*. *See* __ U.S. __, 125 S.Ct. 1968, 161 L.Ed.2d 856 (2005). We will of course reconsider *EC I* as instructed, but we reinstate it as our controlling precedent because the intervening decision in *Pasquantino* does not substantively "cast doubt" on it.

I. The Revenue Rule and Civil RICO Claims by Foreign Governments

Under the long-standing common law doctrine known as the "revenue rule," the courts of one nation will not enforce final tax judgments or unadjudicated tax claims of other nations. *Canada*, 268 F.3d at 106. In *Canada*, the Canadian government sought recovery under RICO of tax revenue and law enforcement costs lost to smuggling. *Id.* at 106, 131-32. We held that recovery of unpaid taxes would constitute "direct enforcement" of a foreign sovereign's tax laws, and recovery of law enforcement costs would constitute "indirect enforcement." *Id.* at 131-32. We concluded that RICO did not abrogate the revenue rule, *see id.* at 109, and that both claims were therefore barred by that rule. *Id.* at 131-32.[6]

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6. Judge Calabresi, a member of this panel, dissented in *Canada*, 268 F.3d at 135. As we noted in *EC I*, 355 F.3d at 132 n. 4, although he continues to believe that *Canada* was wrongly decided, Judge Calabresi, like the other members of this panel, recognizes that we are bound by circuit precedent, and that *Canada* controls the disposition of this case because *Pasquantino* does not cast doubt on the holding in *EC I*.

The plaintiffs in the present case, as in *Canada*, are foreign sovereigns suing under RICO for law enforcement costs and tax revenue lost to smuggling. *EC I*, 355 F.3d at 132. In the briefs and argument which led to our decision in *EC I*, the plaintiffs argued that the revenue rule had been abrogated by amendments to RICO embodied in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub.L. No. 107-56, 115 Stat. 272 (the "Patriot Act").

The Patriot Act added certain smuggling or export control violations to the list of RICO predicate acts under 18 U.S.C. § 1956(c)(7). Pub.L. No. 107-56, § 315. These new provisions dealt with precisely the type of conduct alleged by the plaintiffs in *EC I*. *EC I*, 355 F.3d at 133.[7] Nevertheless, we found that neither the amendments nor their legislative history evidenced Congress's intent to abrogate the revenue rule to allow claims such as the plaintiffs'. *See id.*

We stressed in our opinion that the revenue rule is designed to address two concerns: first, that policy complications and embarrassment may follow when one nation's courts analyze the validity of another nation's tax laws; and second, that the executive branch, not the judicial branch, should decide when our nation will aid others in enforcing their tax laws. *Id.* at 131. These twin concerns for

7. Although the Patriot Act amended RICO to include precisely the conduct at issue, we noted that "the conduct alleged in *Canada* was also within the scope of RICO's prohibitions," *id.* (citing *Canada*, 268 F.3d at 106-08); in neither case did this preclude application of the rule.

sovereignty and separation of powers are important to the revenue rule analysis, because they imply certain exceptions to the rule. In particular, when the executive branch affirmatively consents to litigation (e.g., by initiating it in a criminal prosecution), there is little reason to worry about infringing on the executive's sphere of decision-making, and the rule will not be applied. *Id.* at 132.

II. *Pasquantino* and Its Impact

Pasquantino considered whether the revenue rule precluded a criminal prosecution for wire fraud under 18 U.S.C. § 1343 for use of interstate wirings as part of a scheme to smuggle liquor into Canada. The Supreme Court first determined that Canada's right to collect tax money was "property" for purposes of the statute, and that a plot to smuggle liquor into Canada was a scheme to defraud Canada of that right to collect tax money. 125 S.Ct. at 1772-73. Thus, the plain language of the statute created liability for this type of smuggling. *Id.* The Court then held that the revenue rule did not preclude criminal prosecutions of this kind.

> None [of the cited cases applying the revenue rule] involved a domestic sovereign acting pursuant to authority conferred by a criminal statute. The difference is significant. An action by a domestic sovereign enforces the sovereign's own penal law. A prohibition on the enforcement of *foreign* penal law does not plainly prevent the *Government* from enforcing a *domestic* criminal law.

Id. at 1776 (second emphasis added). The Court admitted that "this criminal prosecution 'enforces' Canadian revenue

law in an attenuated sense," but held the connection too attenuated to trigger the rule. *Id.* at 1778.

The Supreme Court also analyzed the question in light of the purposes of the revenue rule and found that concerns about sovereignty and separation of powers were not implicated where the United States government brings a criminal prosecution. *See id.* at 1779-80. First, in light of the government's decision to prosecute, the Court found "little risk of causing the principal evil against which the revenue rule was traditionally thought to guard: judicial evaluation of the policy-laden enactments of other sovereigns." *Id.* at 1779. The fact of the prosecution implies an assessment of risk by the executive branch on which the courts may rely. "[W]e may assume that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction." *Id.*

Second, the Court found concerns about separation of powers greatly diminished where the government brings a prosecution within the bounds of a statute created by Congress.

> The present prosecution, if authorized by the wire fraud statute, embodies the policy choice of the two political branches of our Government—Congress and the Executive—to free the interstate wires from fraudulent use, irrespective of the

> object of the fraud. Such a reading of the wire fraud statute gives effect to that considered policy choice.

Id. at 1780. Where the two political branches have approved a legal action that may advance the policies of a foreign government, the courts do not overstep their authority by allowing the action to go forward. Thus, the involvement of the United States government was a key factor in determining the outcome of *Pasquantino*.

The present civil lawsuit, on the other hand, is brought by foreign governments, not by the United States. Moreover, the executive branch has given us no signal that it consents to this litigation. *See EC I*, 355 F.3d at 137 (executive branch's failure to intervene in opposition to suit does not constitute an affirmative expression of consent).[8] In short, the factors that led the *Pasquantino* Court to hold the revenue rule inapplicable to § 1343 smuggling prosecutions are missing here.

Contrary to plaintiffs' assertion that *Pasquantino* rejects this Circuit's approach to the revenue rule, *Pasquantino*

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8. In fact, we note that in *Pasquantino*, as well as in *Canada*, the United States government argued that the revenue rule does not apply to criminal prosecutions, but agreed that the rule applies to civil cases brought by foreign governments involving any direct or indirect attempt to enforce their tax laws. Brief for the United States at 15 n. 4, *Pasquantino v. United States*, __ U.S. __, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005) (No. 03-725) (citing Brief for the United States at 11-13, *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 537 U.S. 1000, 123 S.Ct. 513, 154 L.Ed.2d 394 (2002) (No. 01-1317)).

actually affirms the prior law of this Circuit, under which the revenue rule was held inapplicable to § 1343 smuggling prosecutions. In *United States v. Trapilo*, 130 F.3d 547, 552-53 (2d Cir.1997), we held that the revenue rule is not implicated by a smuggling prosecution under § 1343, because a § 1343 conviction requires a finding that the defendant schemed to defraud, but not a finding that the scheme succeeded. Thus, in § 1343 cases, courts do not actually pass on the validity of the foreign law. *Id.* The reasoning in *Trapilo* was perhaps different from the reasoning in *Pasquantino*, but the rule it established was the rule of *Pasquantino*: wire fraud prosecutions for smuggling are not barred by the revenue rule. Thus, *Pasquantino* did not shift the limits of the revenue rule's protection in this Circuit.

The plaintiffs argue that *Pasquantino* adopts a narrow version of the revenue rule, under which only suits whose "whole object" is the collection of foreign tax revenue are barred. They point to a sentence in *Pasquantino* in which the Supreme Court found that "the link between this prosecution and foreign tax collection is incidental and attenuated at best, making it not plainly one in which 'the whole object of the suit is to collect tax for a foreign revenue.' " 125 S.Ct. at 1777 (quoting *Peter Buchanan Ltd. v. McVey*, 1955 A.C. 516, 529 (Ir.H.Ct.1950), *app. dism'd*, 1955 A.C. 530 (Ir.Sup.Ct.1951)). But the same paragraph also uses the phrases "main object" and "primary object" to describe the inquiry, *Pasquantino*, 125 S.Ct. at 1777, implying that a suit which had secondary objects irrelevant to revenue collection might still be barred by the rule. We acknowledge that, although it seems reasonable to assume the Supreme Court intended the three formulations to be

treated as roughly synonymous, this language in *Pasquantino* is not entirely clear. But the "whole object" of the present suit is to collect tax revenue and the costs associated with its collection. Thus, under any of the available formulations of the revenue rule, plaintiffs' claims are barred.[9]

The plaintiffs argue that the present suit seeks to vindicate an interest of the United States government in the enforcement of its own laws, i.e., RICO, rather than a foreign revenue interest. This was the argument of the dissent in *Canada*. *See* 268 F.3d at 137 (Calabresi, J., dissenting) ("[W]hen American law renders an activity—including the violations of foreign tax laws—an American tort or crime, the issues of whether our foreign policy favors or disfavors the particular form of taxation involved or the choice of items to be taxed must disappear."). Whatever the merits of this argument, *Pasquantino* does not endorse it.

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9. The plaintiffs also argue that *Pasquantino* conflicts with *Canada* because *Canada* cited the small number of treaties in which the United States agreed to enforce foreign tax judgments as evidence of the political branches' "continuing policy preference against enforcing foreign tax laws." *Canada*, 268 F.3d at 118. In *Pasquantino*, the Supreme Court noted that United States tax treaties did not "convince [the Court] that petitioners' scheme falls outside the terms of the wire fraud statute." 125 S.Ct. at 1773 (citing *Canada*, 268 F.3d at 115-119). The Supreme Court did not criticize *Canada* for relying on those treaties as evidence of congressional intent. Also, we note that the existence of those treaties, although it demonstrates that the revenue rule is consistent with the political branches' continuing policy preferences, hardly formed the basis of the opinion in *Canada*. We therefore decline to interpret the Supreme Court's passing comment as an attack on the reasoning in *Canada*.

As we held in *Canada*, "[w]hat matters is not the form of the action, but the substance of the claim." *Id.* at 130. Here, the substance of the claim is that the defendants violated foreign tax laws. "When a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes of foreign relations policy that are assigned to—and better handled by—the political branches of government." *Canada*, 268 F.3d at 114. In *Pasquantino*, this concern was alleviated by the direct participation of the political branches in the litigation. *See* 125 S.Ct. at 1779-80. Here we have no such assurance. We therefore see no reason why *Pasquantino's* analysis should disturb our conclusion that the revenue rule bars civil RICO suits by foreign governments against smugglers.[10] *Pasquantino* casts no doubt on the reasoning or the result of *EC I*.

CONCLUSION

For the foregoing reasons, our opinion in *EC I* is REINSTATED. The judgment of the district court is AFFIRMED as to the judgments in *European Community v. RJR Nabisco, Inc.*, 355 F.3d 123, and *Department of Amazonas v. Philip Morris Companies*, No. 02-7325, and VACATED AND REMANDED as to *European Community v. Japan Tobacco, Inc.*, 2002 WL 32443614, for further proceedings consistent with this opinion and our reinstated opinion in *EC I*.

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10. Nor can plaintiffs avoid the revenue rule by adding claims for injunctive relief compelling defendants to obey their tax laws. As we noted in *EC I*, "injunctions would have the effect of extraterritorially enforcing plaintiffs' tax laws just as directly as would their claims for damages." 355 F.3d at 138. *Pasquantino* in no way alters this analysis.

APPENDIX B — ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING THE PETITION AND REMANDING THE CASE TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MAY 2, 2005

SUPREME COURT OF THE UNITED STATES

No. 03-1427

EUROPEAN COMMUNITY, et al.,

Petitioners,

v.

RJR NABISCO, INC., et al.,

Respondents.

May 2, 2005.

Case below, 355 F.3d 123.

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Pasquantino v. United States*, 544 U.S. __, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005).

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JANUARY 14, 2004

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: January 20, 2003 Decided: January 14, 2004)

Docket Nos. 02-7325 (L), 02-7330 (CON), 02-7323

THE EUROPEAN COMMUNITY, Acting on its own behalf and on behalf of the Member States it has power to represent, and the KINGDOM OF BELGIUM, REPUBLIC OF FINLAND, FRENCH REPUBLIC, HELLENIC REPUBLIC, FEDERAL REPUBLIC OF GERMANY, ITALIAN REPUBLIC, GRAND DUCHY OF LUXEMBOURG, KINGDOM OF THE NETHERLANDS, PORTUGUESE REPUBLIC, and KINGDOM OF SPAIN, Individually,

Plaintiffs-Appellants,

— v. —

RJR NABISCO, INC., R.J. REYNOLDS TOBACCO CO., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL, INC., RJR ACQUISITION CORP., f/k/a NABISCO GROUP HOLDINGS CORP. and R.J. REYNOLDS TOBACCO HOLDINGS, INC., PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS COMPANIES, INC., PHILIP MORRIS INCORPORATED, d/b/a PHILIP MORRIS PRODUCTS, INC., and PHILIP MORRIS DUTY FREE, INC.,

Defendants-Appellees.

Appendix C

DEPARTMENT OF AMAZONAS, DEPARTMENT OF ANTIOQUIA, DEPARTMENT OF ATLANTICO, DEPARTMENT OF BOLIVAR, DEPARTMENT OF CAQUETA, DEPARTMENT OF CASANARE, DEPARTMENT OF CESAR, DEPARTMENT OF CHOCO, DEPARTMENT OF CORDOBA, DEPARTMENT OF CUNDINAMARCA, DEPARTMENT OF HUILA, DEPARTMENT OF LA GUAJIRA, DEPARTMENT OF MAGDALENA, DEPARTMENT OF META, DEPARTMENT OF NARINO, DEPARTMENT OF NORTE DE SANTANDER, DEPARTMENT OF PUTUMAYO, DEPARTMENT OF QUINDIO, DEPARTMENT OF RISARALDA, DEPARTMENT OF SANTADER, DEPARTMENT OF SUCRE, DEPARTMENT OF TOLIMA, DEPARTMENT OF VALLE DEL CAUCA, DEPARTMENT OF VAUPES and SANTA FE DE BOGOTA, CAPITAL DISTRICT,

Plaintiffs-Appellants,

— v. —

PHILIP MORRIS COMPANIES, INC., PHILIP MORRIS INCORPORATED, d/b/a PHILIP MORRIS PRODUCTS, INC., PHILIP MORRIS LATIN AMERICA SALES CORPORATION, PHILIP MORRIS DUTY FREE, INC., BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD., B.A.T. INDUSTRIES, P.L.C., BROWN & WILLIAMSON TOBACCO CORPORATION, USA; BATUS TOBACCO SERVICES, INC. and BRITISH AMERICAN TOBACCO (SOUTH AMERICA) LTD.,

Defendants-Appellees.

Appendix C

THE EUROPEAN COMMUNITY, Acting on its own behalf and on behalf of the Member States it has power to represent, and the KINGDOM OF BELGIUM, REPUBLIC OF FINLAND, FRENCH REPUBLIC, HELLENIC REPUBLIC, FEDERAL REPUBLIC OF GERMANY, ITALIAN REPUBLIC, GRAND DUCHY OF LUXEMBOURG, KINGDOM OF THE NETHERLANDS, PORTUGUESE REPUBLIC, and KINGDOM OF SPAIN, Individually,

Plaintiffs-Appellants,

— v. —

JAPAN TOBACCO, INC., JT INTERNATIONAL MANUFACTURING AMERICA, INC., JTI DUTY-FREE USA, INC., JT INTERNATIONAL S.A., JAPAN TOBACCO INTERNATIONAL U.S.A., INC. and PREMIER BRANDS, LTD.,

Defendants-Appellees.

SOTOMAYOR, *Circuit Judge.*

Plaintiffs-appellants are the European Community ("EC") and various of its member states (collectively, the "EC plaintiffs"), as well as certain Departments of the nation of Colombia (the "Departments of Colombia," and collectively with the EC plaintiffs, "plaintiffs").[1] They appeal

1. The EC plaintiffs, in addition to the EC itself, are the following nations: the Kingdom of Belgium, Republic of Finland, French Republic, Hellenic Republic, Federal Republic of Germany, (Cont'd)

from the judgment of the United States District Court for the Eastern District of New York (Garaufis, J.), dismissing their complaints in three related suits against the defendants, tobacco product manufacturers Philip Morris, RJR Nabisco, Brown & Williamson Tobacco Corp., British American Tobacco, Japan Tobacco, Inc., and each one's affiliated entities. Plaintiffs allege that the defendants have violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, by masterminding several ongoing schemes to smuggle contraband cigarettes into the plaintiffs' territories. In the process, the defendants allegedly have entered into conspiracies to commit mail and wire fraud, money laundering, misrepresentations to customs authorities, and various common law torts. Plaintiffs claim that the defendants' conduct has caused them economic harm in the form of lost tax revenues and law enforcement costs. The district court dismissed the complaints in their entirety, finding that because plaintiffs' claims were premised on purported violations of their tax laws, they would require the court to interpret and enforce foreign revenue laws, in violation of the revenue rule and this Court's holding in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir.2001) ("*Canada*"),

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(Cont'd)
Italian Republic, Grand Duchy of Luxembourg, Kingdom of the Netherlands, Portuguese Republic, and Kingdom of Spain. The Colombian plaintiffs are the following Departments: Amazonas, Antioquia, Atlantico, Bolivar, Caqueta, Casanare, Cesar, Choco, Cordoba, Cundinamarca, Huila, La Guajira, Magdalena, Meta, Narino, Norte De Santander, Putumayo, Quindio, Risaralda, Santader, Sucre, Tolima, Valle Del Cauca, Vaupes, and Santa Fe De Bogota, Capital District.

cert. denied, 537 U.S. 1000, 123 S.Ct. 513, 154 L.Ed.2d 394 (2002).

On appeal, plaintiffs primarily contend that *Canada* does not bar their suit because, subsequent to that decision, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub.L. No. 107-56, 115 Stat. 272 (the "Patriot Act"), which amended RICO to include terrorism-related offenses as predicate acts, and has legislative history that plaintiffs maintain reflects congressional intent to allow foreign sovereigns to use RICO to impose liability on domestic tobacco companies that attempt to evade their revenue laws. We hold that the Patriot Act and its legislative history do not constitute the clear evidence of congressional intent necessary to find that Congress has abrogated the revenue rule.

Plaintiffs also challenge the district court's dismissal of their RICO claims predicated on money laundering activities without leave to replead. We hold that the district court did not abuse its discretion in denying leave to replead because doing so rendered the judgment final and thus appealable. Moreover, plaintiffs have not demonstrated any prejudice arising from having to replead their claims in a new action.

Finally, the EC and its member states challenge the district court's dismissal of their action against Japan Tobacco, Inc., and its affiliated entities, as barred by the revenue rule, on the ground that the plaintiffs had not yet had a chance to serve the defendants with the complaint when the district court rendered its decision. We hold that the

dismissal was premature because absent proper service upon the defendants, the court did not yet have jurisdiction over the action. We therefore vacate and remand for further proceedings.

BACKGROUND

This appeal arises from three actions filed by the plaintiffs that were treated as related and decided together by the district court. Because the plaintiffs make substantially similar allegations, seek the same damages, and rely on the same legal theories in the three complaints, the cases are identical in all relevant respects, and we will not differentiate among the actions, except where necessary.

The EC plaintiffs allege that the tobacco companies directed and facilitated contraband cigarette smuggling by studying smuggling routes, soliciting smugglers, and supplying them with cigarettes encased in packages that allowed the defendants to monitor and control the smuggling. The smugglers would then forge shipping documents and route the cigarettes so as to avoid paying the customs duties and excise taxes of the countries into which the cigarettes were smuggled. The profits from the smuggling were partially funneled into bonuses and kickbacks for defendants' executives. Facilitating the smuggling trade also enabled the tobacco companies to argue to the public and the EC that the high import taxes maintained by the EC's member states were fostering a black market in cigarettes. Moreover, the defendants allegedly knew or should have known that the funds used by the smugglers to purchase the cigarettes were generated through the sale of illegal narcotics in the United

States and then laundered through a black market money exchange before being paid to the defendants.

The Departments of Colombia make similar allegations, claiming that the defendants have established and maintained small volumes of legal cigarette sales in Colombia in order to conceal and facilitate the many illegal shipping routes into the country. Some of the defendants collectively engaged in a number of meetings to coordinate their use of smuggling and to fix the prices of smuggled cigarettes. They have also labeled their products so as to exercise control over the smuggling, have secreted the proceeds in Swiss banks, and have lobbied for lower import taxes on the ground that high taxes promote smuggling. Finally, the defendants allegedly were aware that Colombian smugglers were funding their smuggling activities with the laundered proceeds of narcotics sales made in the United States.

The plaintiffs assert that the defendants and others participated in a smuggling enterprise within the meaning of RICO, *see* 18 U.S.C. § 1961(4), and that they committed a number of predicate acts of racketeering, including wire and mail fraud, money laundering arising from both the defendants' acceptance of the proceeds from narcotics trafficking as payment for cigarettes and their attempts to conceal their smuggling profits, and violations of the Travel Act, 18 U.S.C. §§ 1952, 1961(1)(B). They also assert a number of state common law claims against the defendants, including negligent misrepresentation, public nuisance, unjust enrichment, and common law fraud.

Appendix C

All of the complaints allege the same damages and seek the same monetary and injunctive relief. The plaintiffs seek treble damages pursuant to RICO, claiming that as a result of the smuggling, "the proper duties and taxes have not been paid on the aforesaid cigarettes," including customs duties, value-added taxes, and excise taxes amounting to hundreds of millions of dollars per year. They also claim that they have been "required to expend substantial funds to fight against cigarette smuggling." In addition, the plaintiffs seek a plethora of injunctive relief that would require the defendants to cease their smuggling activities, to disgorge their profits from smuggling, and to create protocols and compliance programs that would allow the plaintiff nations' law enforcement authorities to ensure that defendants are complying with plaintiffs' customs and revenue laws.

Plaintiffs began filing these lawsuits in 2000, and since then the cases have had a somewhat complicated procedural history. Initially, the Departments of Colombia filed suit against Philip Morris, Brown & Williamson Tobacco Corporation, British American Tobacco South America Ltd., and their affiliated companies, *see Department of Amazonas v. Philip Morris Companies*, No. 00 Civ. 2881(NGG). Shortly thereafter, the EC, on behalf of itself, sued RJR Nabisco, Philip Morris, Japan Tobacco, British American Tobacco, Brown & Williamson, and their affiliates, *see European Community v. RJR Nabisco, Inc.*, No. 00 Civ. 6617(NGG), and the action was consolidated with the *Amazonas* action. The district court subsequently deconsolidated the cases and dismissed the EC's lawsuit because the EC itself did not have standing under RICO, although it reserved decision on the defendants' motion to dismiss in the *Amazonas* case.

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See European Community v. RJR Nabisco, Inc., 150 F.Supp.2d 456, 459, 500-02 (E.D.N.Y.2001) ("*European Community I*").

The EC again filed suit against RJR Nabisco and Philip Morris in August 2001, this time with several of its member states as co-plaintiffs, and the case was marked related to the still-pending *Amazonas* case. *See European Community v. RJR Nabisco, Inc.*, No. 01 Civ. 5188(NGG). In October 2001, this Court decided *Canada*, holding that claims by foreign sovereigns that were premised on violations of foreign tax laws are barred by the revenue rule. *Canada*, 268 F.3d at 126. Based on our holding in *Canada*, the defendants in the EC plaintiffs' lawsuit moved to dismiss the complaint in December 2001, and that motion was joined with the pending motion to dismiss in the *Amazonas* case. Before the district court ruled on these motions, the EC plaintiffs filed a separate lawsuit against Japan Tobacco and its affiliated companies in January 2002, containing the same allegations as its suit against RJR Nabisco. *See European Community v. Japan Tobacco, Inc.*, No. 02 Civ. 164(NGG). This suit was also marked related to the two pending lawsuits. In February 2002, before the EC plaintiffs had served the Japan Tobacco defendants with the summons and complaint, the district court ruled on the outstanding motions to dismiss, dismissing all three complaints as barred by the revenue rule. *European Community v. Japan Tobacco, Inc.*, 186 F.Supp.2d 231 (E.D.N.Y.2002) ("*European Community II*").

Appendix C

The district court held that plaintiffs' RICO claims were premised on lost tax revenues, and *Canada* therefore required that all of the claims be dismissed. *Id.* at 236-37, 241-45. Although plaintiffs' complaints do not distinguish between "smuggling" and "money laundering" claims, but simply allege both types of conduct as predicate acts of racketeering under RICO, the district court treated them separately in its decision. The court dismissed the smuggling claims on the basis of the revenue rule, reasoning that, like the plaintiff foreign sovereign in *Canada,* plaintiffs here sought relief based solely on lost tax revenues and expenditures made in furtherance of their revenue laws. Adjudicating the claims would therefore require the court to interpret and enforce foreign revenue laws, in contravention of *Canada* 's holding that, in most circumstances, courts may not pass upon foreign tax laws. *Id.* at 236-37. Responding to plaintiffs' argument that our holding in *Canada* was displaced by the passage of the Patriot Act, the court concluded that the text and legislative history of the Act's RICO amendments did not provide clear evidence of congressional intent to abrogate the revenue rule. *Id.* at 238-42. The court also dismissed the money laundering claims without prejudice, finding that these claims were premised on the alleged smuggling scheme because they involved the laundering of the funds for, and proceeds from, the smuggling activities. *Id.* at 243- 45. When considered independently of the smuggling allegations barred by the revenue rule, therefore, the money laundering claims did not allege any causal connection between the alleged money laundering and the lost tax revenues. *Id.* at 242-45. The district court entered judgment dismissing the complaints

in all three actions on March 21, 2002. The court dismissed the smuggling claims with prejudice, and the money laundering claims without prejudice.[2] This appeal followed.

DISCUSSION

On appeal, plaintiffs raise a number of challenges to the district court's dismissal of the three complaints. With respect to the court's decision on the merits, plaintiffs concede that our decision in *Canada* establishes that suits to enforce foreign tax laws implicate the revenue rule, but argue primarily that the legislative history of the Patriot Act, passed in October 2001, evinces congressional intent to allow foreign sovereigns to use RICO to sue tobacco companies for lost tax revenues. Thus, plaintiffs contend that the Patriot Act requires us to find that Congress has abrogated the revenue rule for the purposes of RICO suits. Plaintiffs also attempt to distinguish their claims from those at issue in *Canada* by arguing that the revenue rule is not triggered here because the executive branch has indicated its consent to this suit, and that the district court misconstrued the revenue rule as an absolute bar to suit rather than a discretionary rule, and consequently failed to exercise its discretion.

Plaintiffs also appeal the district court's dismissal of the money laundering claims without leave to replead, but do not challenge the court's substantive characterization of the claims as they were alleged in the complaints. Finally, the EC plaintiffs challenge the district court's dismissal of their

2. Although the district court at first granted leave to replead the money laundering claims, it later amended its judgment to deny leave to replead.

suit against Japan Tobacco before it had been served with the complaint or appeared in the action.

We review the district court's dismissal of the complaints *de novo*. *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 194 (2d Cir.2003). All inferences must be drawn in favor of the plaintiffs, and we may affirm only if we find that, taking the allegations in the complaints as true, the plaintiffs have alleged no facts upon which they can be granted relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). We review the district court's denial of leave to replead for abuse of discretion. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 168 (2d Cir.2003).

I. The Revenue Rule Holding

A. *Canada*'s Explication of the Revenue Rule

We explained in *Canada* that the common law revenue rule holds that the "courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." *Canada*, 268 F.3d at 109. The revenue rule is implicated whenever "the substance of the claim is, either directly or indirectly, one for tax revenues," *id.* at 130, such that "the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff," *id.* at 131 (quoting *United States v. Harden*, [1963] S.C.R. 366, 371). A suit directly seeks to enforce foreign tax laws when a judgment in favor of the plaintiffs would require the defendants to reimburse them for lost tax revenues. In contrast, indirect enforcement occurs when a foreign state seeks a remedy that would give

extraterritorial effect to its tax laws; for instance, a suit seeking damages based on law enforcement costs is an attempt to shift the cost of enforcing the tax laws onto the defendants, and would therefore require the court indirectly to enforce the tax laws. *Id.* at 131-32.

Canada holds that the revenue rule reflects both sovereignty and separation of powers concerns. *Id.* at 126. The courts of one sovereign will not enforce the laws of another sovereign if ~~they are~~ contrary to the public policy of the forum state. Tax laws strongly implicate this principle, as they often embody the political and social judgments of the sovereign and its people. Accordingly, claims by foreign sovereigns invoking their tax statutes may embroil the courts in an evaluation of the foreign nation's social policies, an inquiry that can be embarrassing to that nation and damaging to the forum state. *Id.* at 112. Moreover, because the conduct of foreign relations is primarily the realm of the legislative and executive branches, judicial examination and enforcement of foreign tax laws at the behest of foreign nations may conflict with the other branches' policy choices with respect to cooperation in tax enforcement, and create the risk that the judiciary will be "drawn into issues and disputes of foreign relations policy that are assigned to—and better handled by—the political branches of government." *Id.* at 114-16, 123.

Although the revenue rule arose out of the pragmatic desire of eighteenth-century English judges to promote "British trade that would otherwise have been unlawful," *European Community II*, 186 F.Supp.2d at 234 (internal quotation marks omitted), we held that it remains in force

because it continues to protect modern separation of powers and sovereignty concerns, *Canada*, 268 F.3d at 109-15. In *Canada*, we undertook an extensive examination of the tax treaties in effect between the United States and other nations, and concluded that their grant of only limited reciprocal tax enforcement assistance reflected the political branches' continuing recognition of the revenue rule. *Id.* at 115-19. Thus, the modern revenue rule is rooted in both our perception that the branches of government responsible for conducting foreign affairs wish to uphold the rule, and our reluctance to intrude upon the greater expertise of the political branches by abrogating the rule without evidence that doing so would be consonant with the policies of the other branches.

The revenue rule is therefore not absolute. Even if the substance of the claim invokes foreign tax laws, the revenue rule will not be triggered where the sovereignty and extraterritoriality concerns that inform the rule's application are not present. Thus, for example, where the executive branch has "expressed its consent to adjudication by the courts," the institutional and separation of powers concerns behind the rule are mitigated, because the branch with primary responsibility for conducting foreign relations has indicated that extraterritorial enforcement of the foreign tax laws at issue is in the interests of the United States. *Id.* at 113, 123 n.25. In *Canada*, we suggested that executive consent may be found where the United States itself institutes a prosecution designed to punish those who have defrauded foreign governments of tax revenues, or where the treaties between the United States and the sovereigns at issue provide for broad, reciprocal tax enforcement assistance. *Id.* at 113,

121-24 & nn.24-25. The executive also might indicate its consent to the suit by other means, such as submitting a statement from the State Department or filing an amicus brief.

Absent such indication that the executive branch consents to the suit, a claim that triggers the revenue rule is barred unless the plaintiffs establish that superior law, such as the federal statute that provides the applicable right of action, abrogates the rule in the context in which the plaintiffs seek to enforce their tax laws. *See id.* at 113, 119, 126. Because the revenue rule is a longstanding common law rule, and its abrogation in any one situation necessarily impacts foreign relations, a statute or treaty "must speak directly to the matter" in order to abrogate it. *Id.* at 129 (internal quotation marks omitted). In *Canada*, we held that RICO, as enacted in 1970, does not contain the clear evidence of congressional intent necessary to rebut the presumption that statutes are enacted against the background of the common law and abrogate the revenue rule. *Id.* We found nothing in RICO's text that explicitly authorizes foreign nations to use RICO's civil remedy provisions to enforce their tax laws extraterritorially, and its legislative history did not contain any manifestation of congressional intent to grant such authorization. *Id.*

B. Application of the Revenue Rule to Plaintiffs' Allegations

The allegations in plaintiffs' complaint are markedly similar to those at issue in *Canada*. Plaintiffs are foreign sovereigns attempting to use RICO to impose liability on various domestic and foreign tobacco companies for

smuggling and money laundering, premising their assertions of injury to business and property on the taxes that they would have levied on the cigarettes, had they been legitimately imported, and on the costs of enforcing their tax laws. *Cf. id.* at 132-33. Because plaintiffs' claims arise exclusively from tax-related losses and costs, adjudicating these claims would implicate the concerns discussed in *Canada*, requiring the court to evaluate the policies behind the relevant foreign tax laws, interpret their provisions, and enforce them by awarding damages. *Canada* is therefore controlling, and we must hold that plaintiffs' claims trigger the revenue rule[3] and are barred unless plaintiffs establish that Congress has abrogated the revenue rule as it applies to the circumstances of this case.[4]

Plaintiffs argue that, even though *Canada* held that RICO does not abrogate the revenue rule, the recent amendments to RICO passed as part of the Patriot Act in October 2001 demonstrate Congress's intent to abrogate the rule. The crux of plaintiffs' argument, both on appeal and below, is that the addition of several money laundering crimes to RICO's predicate acts evinces Congress's understanding that the purpose of RICO is to prevent precisely the conduct alleged

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3. Although plaintiffs also argue that the revenue rule is not implicated by their claims, we will first discuss their primary argument, that the Patriot Act has abrogated the rule.

4. Judge Calabresi, a member of this panel, dissented in *Canada*, 268 F.3d at 135. Although he continues to believe that *Canada* was wrongly decided, he, like the other members of this panel, recognizes that we are bound by circuit precedent, and that *Canada* controls the disposition of this case.

here, and the legislative history of the amendments, particularly Congress's deletion from the draft statute of an amendment that would have codified the *Canada* holding, provides clear evidence of Congress's intent to abrogate the rule.

Plaintiffs first focus on the text of the Patriot Act's amendments to RICO, contending that the addition of several international money laundering predicate offenses, such as money laundering crimes against foreign nations and financial conduct that aids terrorist groups, reflects congressional intent to abrogate the revenue rule. *See* 18 U.S.C. § 1956(c)(7). We disagree. The Patriot Act did not change the structure or focus of RICO; it simply added additional offenses to those that constitute predicate acts of racketeering. While we stated in *Canada* that the presumption against statutory derogation of the common law does not apply when "a statutory purpose to the contrary is evident," *Canada*, 268 F.3d at 127 (internal citation omitted), the recent additions to RICO have not so altered RICO's statutory scheme or apparent purpose as to warrant our revisiting *Canada*'s conclusion that RICO does not abrogate the revenue rule. Plaintiffs may be correct that the RICO amendments contained in the Patriot Act are designed to combat precisely the conduct alleged here; but the conduct alleged in *Canada* was also within the scope of RICO's prohibitions, *see id.* at 106-08. Because *Canada* holds that the operation of the rule does not depend on the type of conduct alleged, but rather on the substance of the relief sought, the foreign policy concerns raised by the suit, and the identity of the plaintiffs, a mere showing that the plaintiffs' suit will further the policies embodied in the statute

at issue is not sufficient to abrogate the rule. Rather, the statute must provide clear evidence, textual or otherwise, that Congress believes that the revenue rule should not apply. *Id.* at 128.

Plaintiffs further argue that Congress provided the necessary evidence of congressional intent to abrogate the revenue rule by deleting a provision in the initial version of the Act that would have stated that the addition of the money laundering offenses did not expand the jurisdiction of the courts to hear claims based on foreign excise taxes. The section of the Act that added new international money laundering offenses to RICO's list of predicate acts, *see* 18 U.S.C. §§ 1956, 1961(1), initially provided that the amendments were subject to the following rule of construction:

> (b) **RULE OF CONSTRUCTION**.—None of the changes or amendments made by the Financial Anti-Terrorism Act of 2001 shall expand the jurisdiction of any Federal or State court over any civil action or claim for monetary damages for the nonpayment of taxes or duties under the revenue laws of a foreign state, or any political subdivision thereof, except as such actions or claims are authorized by [a] United States treaty that provides the United States and its political subdivisions with reciprocal rights to pursue such actions or claims in the courts of the foreign state and its political subdivisions.

Financial Anti-Terrorism Act of 2001, H.R. 3004, 107th Cong. § 106(b).[5] This provision was deleted from subsequent versions of the Act, however; as the October 23, 2001 section-by-section analysis of the Act notes, the House of Representatives "dropped [the] provision carving out tobacco companies from RICO liability for foreign excise taxes." 147 Cong. Rec. H7198 (daily ed. Oct. 23, 2001). In addition, several individual legislators indicated their opposition to the rule of construction after it was dropped from the bill. For instance, Senator John Kerry, the author of the money laundering provisions, stated that the provision conflicted with "the intent of the legislature that our allies will have access to our courts and the use of our laws if they are victims of smuggling, fraud, money laundering, or terrorism." 147 Cong. Rec. S11028 (daily ed. Oct. 25, 2001). Plaintiffs argue that the omission of this provision from the enacted text of the Act, as well as the statements by individual legislators indicating opposition to the provision, provide the clear evidence of congressional intent necessary to abrogate the revenue rule.

As an initial matter, plaintiffs have provided no evidence that the deletion of the rule of construction has any effect on the meaning of the Act's amendments to RICO. In deleting the rule of construction that would have codified *Canada*'s holding, Congress left the enacted text of RICO just as silent on the issue of abrogation as it was when *Canada* was decided. Moreover, the absence of the rule of construction does not add any meaning to the text of the new predicate

5. The Financial Anti-Terrorism Act of 2001 was later subsumed into the Patriot Act. *See* 147 Cong. Rec. H7198 (daily ed. Oct. 23, 2001).

offenses, or suggest that those amendments are in any way meant to abrogate the revenue rule. We cannot find clear evidence of congressional intent to overrule *Canada* and abrogate the revenue rule as it applies to RICO suits from legislative history that is not related to any actual amendment to RICO. *See Shannon v. United States*, 512 U.S. 573, 583 (1994) (noting that courts do not give "authoritative weight" to elements of the legislative history that are "in no way anchored in the text of the statute").

Nonetheless, plaintiffs assert a number of arguments in an attempt to establish that the legislative history alone compels us to find congressional intent to abrogate the revenue rule. They first contend that the deletion itself is sufficient evidence of legislative intent to abrogate the rule, relying on the Supreme Court's statement, in the context of interpreting a term within a RICO provision, that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (interpreting the word "interest" in the context of RICO's enterprise provisions). While this rule of construction is helpful in giving meaning to a particular term or phrase contained within a statutory provision, it may not be used to effectively amend a statute where Congress has not actually altered its enacted text. The mere deletion of the provision is a far more ambiguous act than plaintiffs suggest, because Congress's reluctance to codify *Canada*'s holding does not necessarily reflect its desire to overrule that holding. "[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," as "congressional inaction

lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *United States v. Craft*, 535 U.S. 274, 287 (2002) (internal quotation marks and citations omitted). This is particularly the case here, where the proposed amendment simply would have codified the revenue rule as it was explicated in *Canada*, and would not have effected any change in the law. Thus, the deletion alone, untethered to the actual enactment, cannot provide a basis upon which to infer any congressional intent to abrogate the revenue rule, much less the clear evidence required by our holding in *Canada*.

Plaintiffs contend, however, that the statements of several legislators to the effect that foreign nations should be able to use RICO to impose liability on domestic companies for foreign excise taxes indicate that the provision was deleted because Congress intended to abrogate the rule. Several legislators clearly disagreed with the revenue rule, and made remarks to this effect. *See* 147 Cong. Rec. E1936 (daily ed. Oct. 29, 2001) (statement of Rep. Wexler) ("I am pleased that a provision earlier included . . . which would have inhibited RICO liability for foreign excise taxes for tobacco companies, has been dropped from the USA PATRIOT Act. . . ."); *id.* at H7205 (daily ed. Oct. 23, 2001) (statement of Rep. Conyers) ("I am very proud [that] we dropped the administration proposal . . . that would have . . . prevented RICO liability for tobacco companies. . . ."); *id.* at S11028 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry) ("The House-passed rule of construction could have potentially limited the access of foreign jurisdictions to our courts. . . .");

id. at S11007 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy) (stating that Congress had eliminated the "carve-out of tobacco companies from RICO liability for foreign excise taxes"). None of these statements represent the "collective understanding" of the committees responsible for the Act,[6] however, and they are therefore not entitled to very much weight. *See United States v. Nelson*, 277 F.3d 164, 186-87 (2d Cir.2002), *cert. denied*, 537 U.S. 835 (2002) ("We . . . 'eschew [] reliance on the passing comments of one Member, and casual statements from the floor debates.'") (quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984)). Because the legislative record does not suggest anything other than that a few individual legislators wished to abrogate the revenue rule, those legislators' statements do not render the deletion of the proposed rule of construction unambiguous, or provide adequate insight into that deletion. Taken as a whole, the legislative history does not provide clear evidence that Congress intended to abrogate the revenue rule when it enacted the Patriot Act.

Plaintiffs next argue, in the alternative, that the legislative history of the Patriot Act constitutes persuasive post-enactment evidence that Congress intended RICO, as enacted in 1970, to abrogate the revenue rule. This is, in essence, an invitation to revisit *Canada*'s holding that RICO, as it then existed, did not abrogate the revenue rule, in light of the

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6. Although plaintiffs refer to the section-by-section analysis of the Act inserted into the legislative record by Senator Leahy as the "Senate's [R]eport," *see* 147 Cong. Rec. S11007 (daily ed. Oct. 25, 2001), there is no Senate Report on the Patriot Act. The analysis is simply Senator Leahy's own discussion of the provisions of the Act. *See id.* at S10990 (Oct. 25, 2001).

statements made in relation to the proposed rule of construction. The Patriot Act's legislative history, however, does not provide clear evidence of any congressional understanding that RICO has always abrogated the revenue rule. First, the individual legislators' comments indicate, at most, a reluctance to enact the common law revenue rule into the statutory text. They do not explicitly or implicitly express the view that RICO itself abrogates the revenue rule, and we are unwilling to infer this belief from a few passing statements commenting on a provision that had already been removed from the text of the Patriot Act. Second, as noted above, the isolated statements of individual legislators do not express the intent of Congress as a whole, and are therefore weak evidence of post-enactment intent. Third, expressions of legislative intent made years after the statute's initial enactment are entitled to limited weight under any circumstances, even when the post-enactment views of Congress as a whole are evident. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) ("[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance.") (internal quotation marks omitted). Thus, these statements do not convince us that *Canada* wrongly concluded that the 91st Congress did not intend to abrogate the revenue rule when it enacted RICO.

We do not hold that a statute's legislative history may never contain sufficient indicia of congressional intent to find that the statute abrogates the revenue rule. *Cf. Canada*, 268 F.3d at 129 (noting that a statute's legislative history and purpose, as well as its text, may be relevant to the inquiry into whether it abrogates the revenue rule). Here, however,

the purported evidence of intent to abrogate on which plaintiffs rely is particularly weak. We cannot find that a few remarks in the legislative history of the recent amendments to RICO, and the deletion of a provision that would have codified *Canada*, have altered the statute itself, or provided a reliable indicator of congressional intent in the absence of an actual enactment. Were we to treat Congress's decision not to enact the proposed rule of construction as an explicit abrogation of the revenue rule, we would be privileging the legislative history of the Patriot Act over its enacted language. To do so would turn on its head the rule that any analysis of a statute and Congress's intent in enacting it must primarily be founded in the text of the statute itself. *See Shannon*, 512 U.S. at 583 ("To give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretative process.").

C. Plaintiffs' Remaining Attempts to Distinguish *Canada*

Plaintiffs also attempt to distinguish their claims from those at issue in *Canada* by arguing that the foreign policy concerns necessary to trigger the revenue rule are not present here. All of these arguments are foreclosed by *Canada*, however, and do not change our conclusion that the revenue rule is implicated by plaintiffs' claims.

First, plaintiffs argue that the several treaties of friendship between the United States and EC member states indicate that the political branches intend to provide foreign nations with unlimited access to domestic courts.[7]

7. The Palermo Convention of 2000, Vienna Convention of 1988, and Joint European Union-United States Ministerial Statement (Cont'd)

This contention is simply an attempt to reargue *Canada*, which examined the tax treaties currently in force between the United States and various nations, *Canada*, 268 F.3d at 115-22, and concluded that the revenue rule remains "fully consistent with our broader legal, diplomatic, and institutional framework," *id.* at 119. Plaintiffs have not proffered any evidence of a shift in United States policy with respect to tax treaties and enforcement assistance since our decision in *Canada*, and thus we cannot conclude that the political branches now intend to provide judicial tax enforcement assistance to other nations.[8]

(Cont'd)
on Combating Terrorism (2001) all express a policy of cooperation and reciprocal access to foreign and domestic courts in order to combat organized crime and terrorism. *See The United Nations Convention Against Transnational Organized Crime, opened for signature* Dec. 12, 2000, 40 I.L.M. 335 (unratified by the United States); *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Dec. 20, 1988, S. Treaty Doc. No. 101-4 (entered into force Nov. 11, 1990); *Joint EU-US Ministerial Statement on Combating Terrorism*, Sept. 20, 2001, 40 I.L.M. 1263. In *Canada*, however, we implicitly acknowledged that foreign sovereigns have long had access to United States courts, and may sue for violations of domestic laws, *see Canada*, 268 F.3d at 123, but because the revenue rule has reflected the reluctance of the United States and many other nations to enforce foreign tax laws for two hundred years, *id.* at 110, we looked to our nation's tax treaties, rather than treaties that simply provide general access to courts, to determine whether the political branches' actions indicated an abandonment of the rule. Thus, the treaties that plaintiffs cite are not particularly relevant to whether the revenue rule should apply here.

8. Indeed, plaintiffs attempt to argue that the numerous tax
(Cont'd)

Second, plaintiffs contend that, even though the landscape of treaties has not changed since our decision in *Canada*, the executive branch has indicated its consent to this suit, obviating the separation of powers and sovereignty concerns that trigger the rule. The United States has not intervened in opposition to this suit, despite its purported knowledge of the action, and plaintiffs argue that this "neutrality" evidences the United States's judgment that this lawsuit is not antithetical to United States foreign policy interests. We, however, require more than executive inaction in order to find consent to the suit. Rather, the executive branch must affirmatively "express its consent" or approval, for instance, by bringing suit itself. *Id.* at 123 & n.25. Because the political branches have chosen to negotiate treaties providing for only limited reciprocal tax enforcement assistance to other nations, *see id.* at 115-22, absent affirmative consent to a suit by the executive branch, we must assume that a lawsuit seeking general extraterritorial enforcement of foreign tax laws exceeds the bounds of the assistance that the executive branch has decided to give. Moreover, were executive inaction sufficient to render the revenue rule inoperative in a given case, the United States would be required to intervene in every case that might

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(Cont'd)
treaties between the United States and several of the plaintiff nations that provide for only limited tax assistance are irrelevant, because plaintiffs' claims are based not on the treaties but on RICO, rendering their claims civil suits pursuant to United States law rather than foreign tax enforcement claims. This argument is foreclosed by *Canada*, in which we noted that if the substance of a suit seeks extraterritorial tax enforcement, the fact that the suit is brought as a civil claim under domestic law does not affect the application of the revenue rule. *Id.* at 131.

implicate the revenue rule. Such a proposition is clearly untenable.

Third, plaintiffs attempt to distinguish their claims by focusing on their requests for injunctive relief, arguing that "[i]njunctive relief to enjoin or abate conduct on U.S. soil does not involve foreign tax law in any way." Adjudicating plaintiffs' entitlement to injunctive relief, however, would require the court to evaluate and interpret foreign tax laws. Moreover, the requested injunctions would have the effect of extraterritorially enforcing plaintiffs' tax laws just as directly as would their claims for damages, as plaintiffs would have the court order the defendants to cease their smuggling operations, disgorge their profits, and put into place measures that would allow foreign customs officials to ensure that they are complying with those nations' revenue laws. Thus, the requested relief, though different in form, has the same implications as plaintiffs' claims for damages, and is barred by the revenue rule. *See id.* at 131.

Finally, plaintiffs argue that even if their claims implicate the revenue rule, it is a discretionary doctrine that, when triggered, allows the district court to consider the foreign relations implications and domestic law enforcement interests at stake before deciding whether to "abstain" from hearing the claims.[9] This argument is also foreclosed by *Canada,*

9. As part of this argument, plaintiffs contend that the district court should have considered the factual nature of each claim separately, and that "[t]he district court wrongly expanded the revenue rule to 'preempt' state common law without considering the substance of each claim and without finding specific conflicts (Cont'd)

which clearly establishes that, once the sovereignty and separation of powers concerns that inform the rule are implicated by the substance of a plaintiff's claims, the court may not hear those claims absent evidence that the rule has been abrogated. *Id.* at 113. Thus, the district court did not misconstrue the nature of the rule.

II. The District Court's Denial of Leave to Replead the Money Laundering Claims

Plaintiffs also argue that the district court abused its discretion in dismissing their money laundering claims without leave to replead. The district had initially dismissed the claims "without prejudice to replead," but later amended its judgment to dismiss the claims "without prejudice." We review the denial of leave to replead for abuse of discretion, *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 168 (2003), and find none here.[10]

Although the court did not explain its reasoning for amending the judgment and denying leave to replead, the denial had the effect of rendering the judgment final as to

(Cont'd)
with federal policy." Because appellants' state law claims are completely duplicative of their RICO claims, in terms of the conduct alleged and the monetary and injunctive relief sought, the district court was correct to find that these claims also implicate the revenue rule.

10. Because plaintiffs do not challenge the district court's analysis of their money laundering claims, and they are free to replead these claims in a separate action, we do not review the court's determinations as to the nature of the claims and plaintiffs' allegations of causation. *See European Community II*, 186 F.Supp.2d at 242-43.

all claims and allowing an appeal of the entire case. *See Elfenbein v. Gulf & Western Indus., Inc.*, 590 F.2d 445, 449 (2d Cir.1978). Because rendering a final judgment in order to make the decision appealable is a logical reason for denying leave to replead, and plaintiffs have not demonstrated that they are in any way prejudiced by the necessity of repleading their money laundering claims in a new lawsuit, we find that the district court did not abuse its discretion in dismissing the money laundering claims without leave to replead.

III. The District Court's Dismissal of the Japan Tobacco Action

The district court dismissed the EC plaintiffs' action against Japan Tobacco and its affiliated companies along with the two other related lawsuits, even though Japan Tobacco had not yet been served in the action and had not appeared or joined in the motion to dismiss. Because no adverse party had been joined, the district court had not yet assumed jurisdiction over the case. The dismissal for failure to state a claim was therefore premature. *Lewis v. State of New York*, 547 F.2d 4, 6 (2d Cir.1976) (holding that a district court may not dismiss for failure to state a claim before an adverse party has appeared in the suit).

Moreover, the Federal Rules of Civil Procedure allow plaintiffs 120 days after the filing of an action to serve the defendants with the summons and complaint. Fed.R.Civ.P. 4(m). Because plaintiffs had approximately 90 days left in which to serve the defendants when the court dismissed the claim, there was no procedural basis for the dismissal under the Federal Rules.

Appendix C

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED as to the judgments in *European Community v. RJR Nabisco, Inc.*, 2004 WL 60976, No. 02-7330, and *Department of Amazonas v. Philip Morris Companies,* No. 02-7325. Because we affirm the judgment below based on the revenue rule, we need not address the other arguments raised by the defendants on appeal.

The district court's judgment as to *European Community v. Japan Tobacco, Inc.*, No. 02-7323, is VACATED and REMANDED for proceedings consistent with this opinion.

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FILED FEBRUARY 20, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

00-CV-00164 (NGG)

THE EUROPEAN COMMUNITY, et al.,

Plaintiffs,

v.

JAPAN TOBACCO, INC., et al.,

Defendants.

01-CV-05188 (NGG)

THE EUROPEAN COMMUNITY, et al.,

Plaintiffs,

v.

RJR NABISCO, INC., et al.,

Defendants.

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00-CV-02881 (NGG)

DEPARTMENT OF AMAZONAS, et al.,

Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., et al.,

Defendants.

MEMORANDUM AND ORDER

GARAUFIS, *District Judge.*

Now before this court are motions by RJR Nabisco, Inc., Philip Morris, Inc., Japan Tobacco, Inc., and other tobacco industry entities (the "Defendants") to dismiss the complaints in the above-captioned cases. The complaints have been brought by the European Community, various individual member nations of the European Community, and Departments of the nation of Colombia (the "EC," the "Member States," and the "Departments," respectively, or, together, "Plaintiffs"). Because, for the purposes of these motions, there are no relevant differences among the three above-titled cases, this opinion addresses all three. For the reasons discussed below, Defendants' motions are GRANTED in their entirety.

Appendix D

Factual & Procedural History

This action stems from a series of cases that have been before this court, discussed in *The European Community v. RJR Nabisco, Inc.*, 150 F.Supp.2d 456, 459-61 (E.D.N.Y.2001) ("*EC I*"). The above-titled cases brought against RJR Nabisco, et al., and against Japan Tobacco, Inc., et al., were brought by the Member States and the EC after *EC I*, where this court found that the EC, the sole plaintiff in *EC I*, lacked standing to bring civil claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962, *et seq.* ("RICO"). The claims currently before the court are substantially similar to those of *EC I*, and this court presumes familiarity with the complex factual and procedural background reviewed in that opinion. The following brief factual recitation is taken largely from *EC I*.

Plaintiffs allege, in general terms, that Defendants have been actively involved in smuggling contraband cigarettes into the EC, the Member States, and the Departments, as well as various other locations around the world, for many years; that Defendants' smuggling activities span the globe, and include conduct and effects in the Eastern District of New York; that Defendants entered into an agreement with distributors, customers, agents, consultants and other co-conspirators to participate in a common scheme to smuggle contraband cigarettes into the EC, the Member States, and the Departments; that Defendants conspired with others to promote and conceal their smuggling activities by means including, *inter alia*, fixing the price of contraband cigarettes; and that in the process of smuggling cigarettes,

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Defendants engaged the business and services of narcotics traffickers and money launderers, and in so doing facilitated or engaged in the laundering of tainted money. Plaintiffs further allege that, as a result of the foregoing, Plaintiffs have suffered economic harm in the form of lost tax revenues and other costs attributable to rampant illegal activities. Finally, Plaintiffs allege that Defendants agreed with co-conspirators to commit tortious acts, and did in fact commit tortious acts, in conducting the smuggling scheme. Plaintiffs pray for monetary, declarative, and injunctive relief to remedy the foregoing actions.

Discussion

I. Standard of Review

In reviewing a motion brought pursuant to Fed.R.Civ.P. 12(b)(6), the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences from those allegations in the light most favorable to the plaintiff. *See Albright v. Oliver,* 510 U.S. 266, 268 (1994); *Burnette v. Carothers,* 192 F.3d 52, 56 (2d Cir.1999); *Jaghory v. New York State Dep't of Educ.,* 131 F.3d 326, 329 (2d Cir.1997). The complaint may be dismissed only if "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hoover v. Ronwin,* 466 U.S. 558, 587 (1984) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). In deciding such a motion, the "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Bernheim v. Litt,* 79 F.3d 318, 321 (2d Cir.1996) (internal quotation marks and citations omitted).

Appendix D

II. The Revenue Rule

A. Introduction

The common law revenue rule was crafted in eighteenth-century England, in a time of intense commercial rivalry between nations. Note, 77 Harv. L.Rev. 1327, 1328 (1964). The English courts crafted the rule in large part because "refusing acknowledgment of a foreign revenue law ... promote[d] British trade that would otherwise have been unlawful." Barbara A. Silver, *Modernizing the Revenue Rule; The Enforcement of Foreign Tax Judgments*, 22 Ga. J. Int'l & Comp. L. 609, 613 (1992). That rationale eventually became more of an embarrassment than a boon to British and American economic and judicial sensibilities. *See The Anne*, 1 F. Cas. 955, 1 Mason 508, 956 No. 412 (C.C.D.Mass.1818) (Story, J.) (attacking the refusal of courts to enforce foreign municipal regulations as contrary to principles of national comity, sound morals, and public justice); Kovatch, *Recognizing Foreign Tax Judgments*, 22 Hous. J. Int'l L. 265, 287-288 (2000). The revenue rule, however, was never expressly overturned, and lived on, albeit in somewhat tempered form. *See Banco Frances e Brasileiro v. Doe*, 36 N.Y.2d 592, 597 ("[T]he rule [is not] analytically justifiable. Indeed, much doubt has been expressed that the reasons advanced for the rule, if ever valid, remain so. But inroads have been made.")

Case law in this circuit has recognized the great change in conditions under which the revenue rule exists. *United States v. Trapilo*, 130 F.3d 547, 550 n.4 (2d Cir.1997)

("In an age when virtually all states impose and collect taxes and when instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete.") (quoting *Restatement (Third) of the Foreign Relations Law of the United States* § 483, Reporters Note 2 at 613 (1987)). To this date, however, the revenue rule has not been overruled, and while times have changed greatly, the revenue rule has not. This court is controlled by a still-vital version of the rule, predicated on considerations of institutional integrity, recently articulated in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir.2001) ("*Attorney General of Canada*"). The following discussion is controlled by that decision's treatment of the revenue rule.

B. The Revenue Rule After *Attorney General of Canada*

1. The Rule

The revenue rule provides "that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." *Attorney General of Canada*, 268 F.3d at 109. Furthermore, although the Second Circuit, before *Attorney General of Canada*, "ha[d] not ruled on the precise scope of the rule," it is now clear that this Circuit is controlled by "that version of the revenue rule under which United States courts abstain from assisting foreign sovereign plaintiffs with extraterritorial tax enforcement." *Attorney General of Canada* 268 F.3d at 109, 115, 119, 128. Despite the foregoing language, however, this version of the rule is neither a manifestation of standard abstention doctrine, nor an invitation to exercise discretion, as Plaintiffs would have

this court understand it. (Pls.' Mem. of Law in Opp'n to Defs.' Mot. Under 12(B)(6) to Dismiss the Am. Compl. For Failure to State a Claim Upon Which Relief Can be Granted at 35-39.) Instead, when triggered, this "time-honored common law prudential rule" will foreclose relief absent an "indication that Congress intended . . . to abrogate the revenue rule."[1] *Attorney General of Canada* 268 F.3d at 106, 129.

2. Triggering the Rule

In determining whether the revenue rule is triggered, a court that is "presented with . . . a request which potentially implicates the revenue rule" must "examine whether the substance of the claim is, either directly or indirectly, one for tax revenues." *Attorney General of Canada* 268 F.3d at 130. The examination is guided by the Second Circuit's instruction that "[w]hat matters is not the form of the action, but the substance of the claim." *Id.* Where a claim seeks to enforce foreign tax laws, it is of no import that the party bringing the claim does so in compliance with validly enacted United States law, as the revenue rule does not entertain "a formalistic distinction between an action based explicitly

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1. Although it is not express in *Attorney General of Canada*, this court understands the revenue rule to be a federal rule of common law. The close association with federal and constitutional policy concerns, such as foreign relations and separation of powers, as well as the *Attorney General of Canada* Court's repeated invocation of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), indicate to this court that the rule is one of federal common law. *See Attorney General of Canada* 268 F.3d at 109, 112, 114-15, 119, 123, 125-26, 132, 134. The revenue rule thus preempts any conflicting state law.

and entirely on [foreign] law and one which, in effect, pleads violations of [foreign] law through the medium of a United States statute." *Attorney General of Canada* 268 F.3d at 131, n.39.

Analysis of whether a claim is a direct claim for foreign tax revenues turns on "the object of the claim." *Id.* If, "at bottom, [a foreign sovereign plaintiff] would have a United States court require defendants to reimburse [the foreign sovereign plaintiff] for [the foreign sovereign's] unpaid taxes," then the claim is a direct one. *Id.* Indirect claims will also run afoul of the revenue rule, and include any claim whereby the damages alleged by plaintiff are derivative of unpaid foreign taxes, or based on the costs of enforcing foreign tax laws. *Id.* at 132. Thus, any action in which the court "will have to pass on[] the validity of [foreign] revenue laws and their applicability [to the claims at bar]" constitutes "enforcing [foreign] revenue laws," and thereby triggers the revenue rule. *Attorney General of Canada* 268 F.3d at 108 (quoting *Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc.*, 103 F.Supp.2d 134, 143 (N.D.N.Y. 2000)).

3. Exceptions to the Rule

Once the revenue rule is triggered, an action is barred from going forward, with one exception: where the plaintiff can show adequate manifestation of executive or legislative will sufficient to allay the foreign relations and separation of powers concerns underlying the revenue rule, suit may proceed. The exception stems from the fact that the revenue rule derives its continued vitality from foreign relations and

separation of powers concerns. *See Attorney General of Canada* 268 F.3d at 115, 119, 125, 126, 128, 132. Thus, the concerns underlying the current version of the revenue rule are satisfied where the proper coordinate branch adequately confers its blessings on jurisdiction. Therefore, in that instance, a court may go forward with suit and pass on foreign revenue laws, despite the revenue rule. As an example, the *Attorney General of Canada* Court indicates that when the United States brings a suit, action will not be barred by the revenue rule. This is because, when the United States brings the action, "the United States Attorney acts in the interest of the United States, and his or her conduct is subject to the oversight of the executive branch. Thus, the foreign relations interests of the United States may be accommodated throughout the litigation." *Attorney General of Canada* 268 F.3d at 123.[2]

4. Overriding the Rule

Finally, the revenue rule, as a rule of common law, may be abrogated by superior law. A treaty affirmatively conferring jurisdiction over foreign revenue laws in contravention of the revenue rule will supplant the common

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2. Additionally, the *Attorney General of Canada* Court indicates that litigation may potentially proceed, despite concerns for foreign relations matters, where the executive confers consent. *Attorney General of Canada* 268 F.3d at 123, n. 25 (citing *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759-768-770 (1972)). Here, as in *Attorney General of Canada*, "[t]here has been no such expression of consent or approval. . . ." *Id.*

law rule by virtue of being supreme law of the land.[3] U.S. CONST. art. VI. Validly enacted legislation may also abrogate a common law rule. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313-14 (1981). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Attorney General of Canada* 268 F.3d at 127 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)). To do so, a statute must demonstrate "clear evidence of congressional intent to abrogate [the common law rule]." *Attorney General of Canada* 268 F.3d at 127.

III. Application of the Revenue Rule to the Case at Bar

A. The RICO claims

Plaintiffs bring various RICO claims predicated on two grounds: smuggling and money laundering. In this section

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3. This court notes that the *Attorney General of Canada* Court examined treaties at some length for the ability of a given treaty scheme to demonstrate general congruence (or the lack thereof) between domestic adjudication of foreign revenue laws and the policy rationales underlying the revenue rule, rather than for a treaty's clear demonstration of superior law. The *Attorney General of Canada* Court's discussion of treaties, however, occurred under the section of the opinion establishing the continued vitality of the revenue rule, and was designed to reinforce the validity of the policy considerations that ultimately led the court to find for the continued applicability of the revenue rule. This court understands the ultimate ruling in *Attorney General of Canada* to hold that a treaty will only override the revenue rule by virtue of being superior law, and will only adequately effect abrogation with a clear statement of abrogating law. Such a showing has not been made in the case before this court.

of the opinion, the court will consider the RICO claims pursuant to smuggling grounds. The court will consider the claims in light of the money laundering grounds at Part IV of this opinion.

1. The RICO Smuggling Claims Trigger the Revenue Rule

Facing a similar set of RICO claims for cigarette smuggling, the trial court in *Attorney General of Canada* held,

> [T]o state a civil RICO claim, Canada must prove more than the mere intent to defraud another of property or the mere establishment of a scheme to defraud utilizing the mails or wire communications in furtherance of that scheme. Again, to have standing to recover, Canada must allege injury in fact, which ultimately obligates it to prove that some act or acts in furtherance of the scheme caused it to sustain injury. *See* 18 U.S.C. § 1964(c); [*Sedima, S.P.L.R. v. Imex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285 (1985)]. This distinction is critical to the outcome of this action. . . . Thus, to the extent Canada seeks to prove injury to business and property as a result of lost tax revenues and recover therefor, its claims are barred by the Revenue Rule and, therefore, must be dismissed.

Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc., 103 F.Supp.2d 134, 142-144 (N.D.N.Y.2000).

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The Second Circuit supplemented the holding of the District Court with the following:

> To proceed with the law enforcement costs claim, we would have to examine the tax laws at issue in order to assess the causation aspect of this claim. For example, we would have to assess whether the law enforcement costs were in fact spent on achieving the cessation of cigarette smuggling. So doing, we would have to examine whether, when and to what extent the smuggling existed, which would require a determination that tax laws were applicable to defendants. These inquiries could draw the courts into troubled waters.

Attorney General of Canada, 268 F.3d at 133.

The present actions involve RICO claims for injury in the form of lost customs duties, lost value added taxes, and lost excise taxes, and also for injury in the form of additional contributions by Member States to the European Community to compensate for tax revenue that the European Community otherwise would have collected. Predicated on smuggling, the claims all clearly implicate the revenue rule in that they would necessarily cause this court to pass on foreign tax laws.

Plaintiffs also bring various RICO claims predicated on harms derivative of smuggling. The injuries include, *inter alia*, loss of funds spent to combat cigarette smuggling, and coordinate damage to the security and integrity of Plaintiffs' relevant institutions and markets. Additionally,

Appendix D

Plaintiffs seek equitable and injunctive relief designed to impede smuggling, improve future defenses against smuggling, and recoup monies lost to smuggling. All of these claims also trigger the revenue rule under the *Attorney General of Canada* ruling. Here, as there, "we would have to examine whether, when and to what extent the smuggling existed, which would require a determination that tax laws were applicable to defendants." *Attorney General of Canada,* 268 F.3d at 133.

Having triggered the revenue rule, and in order to proceed with their RICO claims predicated on smuggling, Plaintiffs must demonstrate that Congress, in enacting RICO, or in a subsequent amendment to RICO, intended to abrogate the revenue rule. The *Attorney General of Canada* decision, however, states:

> The language and structure of RICO and its legislative history offer no hint that Congress intended the statute to afford a civil remedy to foreign nations for the evasion of foreign taxes. Moreover, there is no language in RICO or in its legislative history that demonstrates any intent by Congress to abrogate the revenue rule. For the statute to change such a time-honored common law prudential rule, it must "speak directly" to the matter; yet it does not. Absent such indication, we must presume Congress understood the common law against which it legislated and intended that this common law doctrine should co-exist with the RICO statute.

Attorney General of Canada, 268 F.3d at 129. Plaintiffs must overcome the foregoing to state a case under RICO.

2. The USA PATRIOT ACT Does Not Abrogate the Revenue Rule Under RICO

a. The USA PATRIOT ACT of 2001

The *Attorney General of Canada* Court has ruled that RICO, on its face, does not abrogate the revenue rule, and has likewise made clear that, to pursue their RICO claims, Plaintiffs must provide evidence that RICO, as it was enacted by the 91st Congress or affirmatively amended thereafter, statutorily abrogates the common law revenue rule. To demonstrate RICO's abrogation of the revenue rule, Plaintiffs direct the court's attention to legislation, passed subsequent to the *Attorney General of Canada* ruling, titled the "Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001", Pub.L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) (hereinafter, the "Patriot Act"). The Patriot Act was passed in the wake of, and as its name indicates, in response to the events of September 11, 2001.

Section 315 of the Patriot Act amends and expands 18 U.S.C. § 1956(c)(7), a RICO provision that establishes money-laundering as a predicate act. Pub.L. No. 107-56, § 315; or 18 U.S.C. § 1961(1). The Patriot Act's expansion of 18 U.S.C. § 1956(c)(7) on its face does not amend RICO with respect to the revenue rule, and Plaintiffs adduce no other amendment to RICO pertaining to the revenue rule.

Thus Plaintiffs rely on the following legislative history, in connection with § 315, to indicate clear abrogation of the revenue rule.

b. The Patriot Act's Legislative History

The legislative history in question turns in part on a Rule of Construction that was part of a version of the Patriot Act, H.R. 3004, that passed the House of Representatives on October 17, 2001. The Rule of Construction, however, was subsequently dropped on reconsideration by the House. H.R. 3162. The Rule of Construction would have provided,

> None of the changes or amendments made by the Financial Anti Terrorism Act of 2001 [the former title of the Patriot Act] shall expand the jurisdiction of any Federal or State court over any civil action or claim for monetary damages for the nonpayment of taxes or duties under the revenue laws of a foreign state, or any political subdivision thereof, except as such actions or claims are authorized by United States treaty that provides the United States and its political subdivisions with reciprocal rights to pursue such actions or claims in the courts of the foreign state and its political subdivisions.

147 Cong. Rec. H6924-01 (daily ed. Oct. 17, 2001). The Section by Section analysis of H.R. 3162 noted the deletion with the following: "Dropped provision carving out tobacco companies from RICO liability for foreign excise taxes." 147 Cong. Rec. H7159-03 (daily ed. Oct. 23, 2001).

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H.R. 3162 passed the House on Oct. 24, 2001. 147 Cong. Rec. H7224-01 (daily ed. Oct. 24, 2001).

Regarding § 315 of the Patriot Act and the deleted Rule of Construction, Representative Wexler, a member of the House Judiciary Committee, stated:

> I am pleased that a provision earlier included in money laundering legislation, which would have inhibited RICO liability for foreign excise taxes for tobacco companies, has been dropped from the USA PATRIOT Act of 2001, the final version of comprehensive anti-terrorism legislation. The sections of the final version of this bill which expand the definition of Specified Unlawful Activities for Money Laundering are a crucial component of the USA PATRIOT Act. We all know that in order to crush terrorism in all its forms, it will be necessary for us to put an end to the money laundering which is essential to the financing of terrorists' networks. In order for our legislation to be effective, our laws against money laundering must have the widest possible scope. Just as criminals continually are finding new and creative ways to subvert and circumvent our laws, our laws must be broad enough and flexible enough to allow our courts to fight against money laundering in any form we find it. In response to United States requests, many of our allies, including the European Community and its Member States have strengthened their money laundering laws in a cooperative effort to battle

> money laundering and terrorism. It is our intent to recognize and assist the efforts of our allies in our joint effort to fight fraud and money laundering wherever and in whatever form we find it. If our allies are victimized by fraud, smuggling or money laundering emanating from U.S. soil, they should have the benefit of U.S. laws and U.S. courts to combat those offenses. The expanded definition of Specified Unlawful Activities will ensure that money laundering associated with crimes or fraud committed against our allies shall constitute violations of U.S. law thereby giving the United States and our allies the maximum capability to utilize U.S. law to combat the money laundering. Just as the United States has always recognized the fundamental right of friendly nations to have access to our courts to enforce their rights, we shall continue to give our full cooperation to our allies in their efforts to combat smuggling and money laundering, including access to our courts and the unimpeded benefit of our criminal and civil laws.

147 Cong. Rec. E1936-02 (daily ed. Oct. 29, 2001) (statement of Rep. Wexler).

Plaintiffs also point to the following comments of Senator John F. Kerry, one of the forces behind § 315:

> It has been brought to my attention that this bill, as originally passed by the House, contained a rule of construction which could have limited

our abi[illegible] provide assistance and cooperation to our foreign allies in their battle against money laundering. The House-passed rule of construction could have potentially limited the access of foreign jurisdictions to our courts and could have required them to negotiate a treaty in order to be able to take advantage of our money-laundering laws in their fight against crime and terrorism. The conference report did not include a rule of construction because the Congress has always recognized the fundamental right of friendly nations to have access to our courts to enforce their rights. Foreign jurisdictions have never needed a treaty to have access to our courts. Since some of the money-laundering conducted in the world today also defrauds foreign governments, it would be hostile to the intent of this bill for us to interject into the statute any rule of construction of legislative language which would in any way limit our foreign allies access to our courts to battle against money laundering. That is why we did not include a rule of construction in the conference report. That is why we today clarify that it is the intent of the legislature that our allies will have access to our courts and the use of our laws if they are the victims of smuggling, fraud, money laundering, or terrorism. I make these remarks today because there should be no confusion on this issue and comments made by others should not be construed as a reassertion of this rule of construction which we have soundly rejected. Our allies have had and must continue

to have the benefit of U.S. laws in this fight against money laundering and terrorism.

Smuggling, money laundering, and fraud against our allies are an important part of the schemes by which terrorism is financed. It is essential that our money laundering statutes have appropriate scope so our law enforcement can fight money laundering wherever it is found and in any form it is found. By expanding the definition of "Specified Unlawful Activity" to include a wide range of offenses against friendly nations who are our allies in the war against terrorism, we are confirming that our money laundering statutes prohibit anyone from using the United States as a platform to commit money laundering offenses against foreign jurisdictions in whatever form that they occur. It should be clear that our intention that the money laundering statutes of the United States are intended to insure that all criminals and terrorists cannot circumvent our laws. We shall continue to give our full cooperation to our allies in their efforts to combat smuggling and money laundering, including access to our courts and the unimpeded use of our criminal and civil laws.

147 Cong. Rec. S10990-02 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry).

c. The Patriot Act Does Not Alter RICO's Treatment of the Revenue Rule

This court acknowledges that the Patriot Act's legislative history offers persuasive evidence that the 107th Congress would not allow the revenue rule to bar civil suit under RICO for injury such as that alleged in the instant case. But Plaintiffs must make more than a showing of what Congress wants or even believes RICO to be. Plaintiffs must adduce legislative history demonstrating that Congress affirmatively acted to statutorily abrogate the revenue rule with RICO. *Attorney General of Canada,* 268 F.3d at 127-28. The legislative history of the Patriot Act fails to make that showing.

i. The Legislative History Does Not Effect Abrogation of the Revenue Rule

The removed rule of construction represents the only actual instance of relevant Congressional action. On the strength of the section-by-section analysis and the statements of Senator Kerry and Representative Wexler, Plaintiffs argue that, in removing the clause that would have enshrined the non-abrogation of the revenue rule, Congress effectively amended RICO, causing RICO instead to abrogate the revenue rule. But the removal of the Rule of Construction is simply too slender a reed upon which to effect an abrogation of the revenue rule and a consequent reversal of *Attorney General of Canada.*

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The Supreme Court has looked askance on inferring action from inaction, and has stated,

> "Failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" A bill can be proposed for any number of reasons, and it can be rejected for just as many others. The relationship between the actions and inactions of the 95th Congress and the intent of the 92nd Congress in passing [the legislation at issue] is also considerably attenuated.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 169-70 (2001) (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990))). In the case at hand, the Second Circuit in *Attorney General of Canada* recently stated as a matter of law that RICO does not abrogate the revenue rule. Congress subsequently removed from the Patriot Act a provision which would have statutorily enshrined the *Attorney General of Canada* holding. Regardless of what Congress's negative action may reveal with respect to Congress's feelings about the *Attorney General of Canada* decision, Congress's removal of the provision does not present this court with the sort of authority required by *Attorney General of Canada* to abrogate the revenue rule. Moreover, the legislative history does not present this court with any superior authority

adequate to find that the Second Circuit has been reversed as a matter of law.[4]

ii. The Legislative History Does Not Demonstrate Prior Abrogation of the Revenue Rule

Alternatively, Plaintiffs may be heard to argue that the legislative history demonstrates that Congress intended to abrogate the revenue rule when it passed RICO in 1970. Again, however, Plaintiffs do not present this court with sufficient evidence to find clear abrogation. While the words of Senator Kerry and Representative Wexler are a powerful condemnation of the effects of the revenue rule, this court

4. This court notes that in certain circumstances, negative legislative action will demonstrate sufficient force to effect positive law. *See, e.g., New York Telephone Co. v. New York State Dep't of Labor,* 440 U.S. 519 (1979) (repeated failure to expressly preempt state power to make policy regarding payments to strikers in the National Labor Relations Act indicated lack of preemption); *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940) (failure to overrule case law extending Sherman Act protections to labor unions indicated legislative endorsement of the case law). As was the case in both *New York Telephone* and *Apex Hosiery,* negative legislative action, when sufficient to effect positive law, commonly does so only where the lack of action may be construed as an affirmative legislative decision not to disturb prior law or practice. William Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L.Rev. 67 (1988). Here, among other factors distinguishing the case at bar, the negative legislative action involved a refusal to enshrine a rule identified in the case law. Instead of passively supporting prior law, then, this legislative inaction would actively overrule preexisting law, *i.e., Attorney General of Canada.* To the extent that legislative inaction can make law in this manner, this court demands a considerably greater showing than that called for in standard inaction cases.

must consider those comments through the lens of established rules of statutory construction. Two rules of construction limit the weight this court may give to the commentary at hand. First, this court is mindful of the Supreme Court's admonition that "the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (quoting *Rainwater v. United States*, 356 U.S. 590, 593 (1958)). Second, statements by isolated Senators and Representatives are entitled to limited weight in determining the will of the entire law-making body. *Bath Iron Works Corp. v. Director*, 506 U.S. 153, 166 (1993); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921). In light of these two admonitions, this court cannot take the comments of Senator Kerry and Representative Wexler to indicate adequately that the 91st Congress clearly abrogated the revenue rule when it passed RICO, however forceful their belief that it did.

3. The RICO Claims Predicated On Smuggling Fail

Plaintiffs have not demonstrated adequate evidence that RICO abrogated the revenue rule. Consequently, Plaintiffs' RICO claims predicated on smuggling grounds fail as a matter of law.

B. The Common Law Claims Predicated On Allegations of Smuggling

As with the RICO claims, the common law claims are predicated on both smuggling and money laundering grounds. In this section of the opinion, the court will consider the

claims as they are brought pursuant to smuggling grounds, and will consider the claims as they are brought pursuant to money laundering grounds under Part IV of the opinion.

1. The Revenue Rule Applies to Common Law Claims

As a rule of common law, the revenue rule applies to common law rights of action. Once triggered, the revenue rule will bar a common law right of action from proceeding, absent an indication in the case law that the right of action is not affected by the revenue rule.

Plaintiffs bring five common law claims: common law fraud, public nuisance, unjust enrichment, negligence, and negligent misrepresentation. Plaintiffs make no showing, and this court finds no demonstration in the case law, that any of these claims are immune to the revenue rule. Consequently, Plaintiffs must satisfy this court that adjudicating the common law claims will not cause this court to pass on foreign revenue laws. Plaintiffs, however, can make no such showing; as discussed, *supra*, adjudication of Defendants' smuggling activities will necessarily cause this court to pass on the applicability of foreign tax laws in making a determination that Defendants in fact engaged in smuggling.

IV. The Money Laundering Grounds

The court now turns to Plaintiffs' RICO and common law claims predicated on allegations of money laundering.

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A. The RICO Claims

1. Plaintiffs Must Adequately Allege Causation Between the Harm and the Underlying Action

The Supreme Court has stated that a "plaintiff's right to sue under [18 U.S.C.1964(c)] require[s] a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Discussing the *Holmes* standard, the Second Circuit has held, "[t]he test of proximate cause, as we summarized it in *Hecht,* is whether the defendant's acts 'are a substantial factor in the sequence of responsible causation,' and whether 'the injury is reasonably foreseeable or anticipated as a natural consequence.'" *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.*, 985 F.2d 102, 104 (2d Cir.1993) (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23- 4 (2d Cir.1990)).

Holmes offers three reasons behind the proximate cause threshold:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. . . . Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the

> violative acts, to obviate the risk of multiple recoveries. . . . And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Holmes, 503 U.S. at 269.

As discussed below, even under the generous standards for a motion to dismiss, Plaintiffs' complaint fails to meet the proximate cause threshold for the RICO claims predicated on grounds of money laundering.[5]

2. The RICO Claims Predicated On Grounds of Money Laundering Do Not Meet the *Holmes* Test

In the complaint before the court, the harm visited on Plaintiffs by Defendants' money laundering is only coherently alleged in concert with the smuggling scheme. On the pleadings, the only apparent connection between the injury asserted and the allegations of money laundering is the harm visited by money laundering as a link in the smuggling chain. As discussed in Part III of this opinion, however, adjudication of the smuggling scheme will require that this court pass

5. As Plaintiffs' claims for injunctive relief under RICO are predicated solely on the smuggling grounds, this court does not address the applicability of *Holmes* to application for injunctive relief under RICO.

impermissibly on the applicability of foreign revenue laws to Defendants' actions. Consequently, the revenue rule bars this court from hearing money laundering claims that, to show harm, will cause this court to adjudicate the smuggling scheme.

Stripped of the harms suffered from smuggling, the complaint offers no additional, distinct causal connection between the allegations of money laundering and the injuries asserted. Simply put, Plaintiffs' complaint attacks a smuggling scheme. The money laundering claims are merely asserted as part of the overarching claims of injury from smuggling. Deprived of that context, Plaintiffs' particular money laundering claims lose all connection to the injuries alleged. While there may yet exist a discreet connection between money laundering and harm suffered by Plaintiffs, this court cannot divine that connection.[6] In sum, where this court is not asked to pass on foreign revenue rules, this court is not presented with the necessary causal connection between Defendants' underlying money laundering actions and the injuries of which Plaintiffs complain.[7]

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6. Plaintiffs' failure with respect to the money laundering grounds is exacerbated by the vague nature of many of the injuries asserted, *e.g.*, those claims asserting as injury the compromised integrity of Plaintiffs' various institutions and markets. While such broad allegations of injury may be appropriate with respect to a widespread smuggling scheme, such allegations simply do not make sense, as presented, in the context of specific claims involving money laundering.

7. This finding is supported by analysis of the reasons given in support of the *Holmes* test. With respect to the first reason, to proceed

(Cont'd)

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B. The Common Law Claims

Plaintiffs bring common law claims for common law fraud, public nuisance, unjust enrichment, negligence, and negligent misrepresentation. The underlying allegations and injuries are identical to those underlying the RICO claims. The common law claims, like the RICO claims, fail for lack of causal connection to the harm alleged, once the money laundering allegations are removed from the context of the smuggling scheme pursuant to the revenue rule.

1. The Legal Standard

To sufficiently assert a right of action under the common law, Plaintiffs must, at the least, establish three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical,'. . . . Second, there must be a

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(Cont'd)

on the money laundering grounds alone, especially in light of the extremely broad injuries alleged, would render proper assessment of damages a likely impossible task. With respect to the second reason given, assigning liability despite the attenuated connection between the money laundering and asserted injuries in the complaint, as it is written, may well expose Defendants to numerous claims stemming from the particular acts. Finally, with respect to the third reason, dismissing these claims will not necessarily deter future claims asserting a cognizable link between Defendants' money laundering activities and consequent injuries.

> causal connection between the injury and the conduct complained of— the injury has to be fairly traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quotations omitted). Furthermore, "[the *Holmes* proximate causation] principles also apply in general terms to the fraud . . . causes of action asserted by plaintiffs under New York law." *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 242-43 (2d Cir.1999) (citing *Ferguson v. Green Island Contracting Corp.*, 36 N.Y.2d 742, 743 (1975)); *Rockaway Blvd. Wrecking & Lumber Co. v. Raylite Elec. Corp.*, 26 A.D.2d 9, 12 (1st Dep't 1966); *Pulka v. Edelman*, 40 N.Y.2d 781, 785 (1976).

2. The Common Law Claims Predicated On Grounds of Money Laundering Do Not Meet the *Lujan* and *Laborers Local 17* Tests

The underlying allegations of money laundering are identical in Plaintiffs' common law and RICO claims. As discussed above, the money laundering allegations are stripped of their causal connection to Plaintiffs' injuries by this court's inability to adjudicate with respect to the greater smuggling enterprise. Without that causal context, Plaintiffs' common law pleadings meet neither the *Lujan* nor the *Laborers Local 17* standard.

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Under *Laborers Local 17*, the common law actions for fraud must meet the heightened *Holmes* test. Here, all of the common law actions are based on the same set of pleadings that failed the *Holmes* test above. Thus, the fraud causes of action—common law fraud, unjust enrichment, and negligent misrepresentation—are ruled out by this court's holding with respect to the RICO claims predicated on money laundering, which claims did not meet the *Holmes* test. *See also Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 316 (1985).

Furthermore, after the revenue rule, the remaining common law claims based on money laundering cannot meet the minimal requirements of *Lujan*, even under the relaxed review of a motion to dismiss.[8] The public nuisance and negligence claims, asserting broad damage remote from isolated money laundering transactions, and without the context of the smuggling scheme, cannot be called fairly traceable to the challenged actions of Defendants.[9] To hold otherwise would essentially put this court in the position of re-pleading Plaintiffs' claims for them. This court, naturally, declines that role.

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8. Again, the connection between Plaintiffs' injuries and Defendants' money laundering activities may be adequately clear when viewed in the context of the greater smuggling scheme, but this court may only view the claims independent of claims that will cause this court to pass on foreign revenue rules. In this more narrow context, as discussed above, the money laundering allegations do not show connection to Plaintiffs' injuries.

9. The same is true of all of Plaintiffs' common law claims based on money laundering. Thus, even if *Laborers Local 17* does not dispose of the common law fraud, unjust enrichment, and negligent misrepresentation claims, the claims must still fail as a matter of law.

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Conclusion

For the reasons stated above, Defendants' motions are granted. Plaintiffs' RICO and common law claims predicated on Defendants' smuggling scheme are DISMISSED with prejudice, and Plaintiffs' RICO and common law claims predicated on Defendants' money laundering transactions are DISMISSED without prejudice to replead.

SO ORDERED.

s/ Nicholas G. Garaufis
Nicholas G. Garaufis
United States District Judge

Dated: February 19, 2002
Brooklyn, New York

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FILED MARCH 21, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

02-CV-00164 (NGG)

THE EUROPEAN COMMUNITY, et al.,

Plaintiffs,

v.

JAPAN TOBACCO, INC., et al.,

Defendants.

01-CV-05188 (NGG)

THE EUROPEAN COMMUNITY, et al.,

Plaintiffs,

v.

RJR NABISCO, INC., et al.,

Defendants.

Appendix E

00-CV-02881 (NGG)

DEPARTMENT OF AMAZONAS, et al.,

Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., et al.,

Defendants.

GARAUFIS, District Judge.

Now before this court is a Fed. R. Civ. P. 59(e) motion brought by defendants in the following two of the above-titled cases: *The European Community, et al. v. RJR Nabisco Inc., et al.,* and *Dep't of Amazonas, et al. v. Phillip Morris Cos., Inc., et al.* Defendants seek to amend and clarify the Judgment entered by the clerk of the court on February 25, 2002, pursuant to this court's Memorandum and Order of February 19, 2002. Because the Memorandum and Order of February 19, 2002, and the Judgment of February 25, 2002, dealt equally with all three of the above-titled cases, this court *sua sponte* applies this Order to the above-titled *The European Community, et al. v. Japan Tobacco, Inc., et al.* as well.

This court hereby ORDERS that the Clerk of the Court for the Eastern District of New York AMEND the Judgment of February 25, 2002, to clarify the following: that the plaintiffs shall take nothing of the defendants; that the

defendants' motions to dismiss the complaints are granted in their entirety; that the plaintiffs' RICO and common law claims on the defendants' smuggling scheme are dismissed with prejudice; and the plaintiffs' RICO and common law claims on the defendants' money laundering transactions are dismissed without prejudice.

SO ORDERED.

Nicholas G. Garaufis
United States District Judge

Dated: March 21, 2002
Brooklyn, New York

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FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-549

IN THE

Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,

Petitioners,

v.

RJR NABISCO, INC., *et al.*,

Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

RONALD S. ROLFE
GARY A. BORNSTEIN
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Counsel for Respondents British American Tobacco (Investments) Limited et al.

MURRAY R. GARNICK
Counsel of Record
ANTHONY J. FRANZE
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Counsel for Respondents Altria Group, Inc. et al.

(Additional counsel listed on inside cover)

DAVID M. BERNICK
JONATHAN C. BUNGE
CHRISTOPHER TURNER
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Counsel for Respondents Brown & Williamson Tobacco Corporation and BATUS Tobacco Services, LLC.

MARY ELIZABETH MCGARRY
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

Counsel for Respondent B.A.T Industries p.l.c.

WILLIAM T. PLESEC
JONES DAY
901 Lakeside Avenue
North Point
Cleveland, OH 44114
(216) 586-3939

TIMOTHY J. FINN
LAURA TUELL PARCHER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondents R.J. Reynolds Tobacco Holdings, Inc., R.J. Reynolds Tobacco Company and RJR Acquisition Corp.

C. STEPHEN HEARD, JR.
EDMUND M. O'TOOLE
MATTHEW T. MCLAUGHLIN
VENABLE LLP
405 Lexington Avenue
62nd Floor
New York, NY 10174
(212) 307-5500

Counsel for Respondent R.J. Reynolds Tobacco International, Inc.

QUESTION PRESENTED

In *Pasquantino v. United States*, 125 S. Ct. 1766 (2005), this Court held that the Revenue Rule does not bar the *United States* from enforcing its *criminal* wire fraud laws in U.S. courts even where the wire fraud relates to smuggling activities that deprive a foreign sovereign of tax revenue.

The question presented here is: Whether *Pasquantino* alters the uniform holdings of the lower federal courts, including two circuit courts addressing the exact issues presented here, that the Revenue Rule does bar *foreign governments* from bringing *civil* actions to enforce their revenue laws in U.S. courts.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents submit the following corporate information:

Respondents R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., and RJR Acquisition Corp. have the following parent corporation: R.J. Reynolds Tobacco Holdings, Inc., f/k/a RJR Nabisco, Inc. Reynolds American Inc., a publicly traded company, is the parent of R.J. Reynolds Tobacco Holdings, Inc. Brown & Williamson Holdings, Inc. owns 42% of the Reynolds American Inc. stock and is, in turn, an indirect subsidiary of British American Tobacco p.l.c.

With respect to Respondents British American Tobacco (Investments) Limited, British American Tobacco (South America) Limited, B.A.T Industries p.l.c., BATUS Tobacco Services, LLC, and Brown & Williamson Tobacco (n/k/a Brown & Williamson Holdings, Inc.), no publicly held company directly owns 10% or more of the stock of any of these Respondents, but 10% or more of each of their stock is indirectly held by British American Tobacco p.l.c., which is a publicly held company. British American Tobacco p.l.c. indirectly through Brown & Williamson Holdings, Inc. owns 42% of Reynolds American Inc., a publicly traded company that is the parent of R.J. Reynolds Tobacco Holdings, Inc. and R.J. Reynolds Tobacco Company. In addition, the Respondents' parent corporations that are not Respondents are: British American Tobacco p.l.c., British American Tobacco (1998) Limited, British American Tobacco (Holdings) Limited, Louisville Securities Limited, BATUS Holdings, Inc. and BATIC, Inc.[1]

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1. B.A.T Industries p.l.c., British American Tobacco (South America) Ltd., and BATUS Tobacco Services, LLC, join this Opposition subject to, and without waiver of, their defenses, including the lack of personal jurisdiction.

Respondent Altria Group, Inc., f/k/a Philip Morris Companies Inc., does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondents Philip Morris USA Inc., f/k/a Philip Morris Incorporated, and Philip Morris International Inc., have the following parent corporation: Altria Group, Inc. No other publicly held company owns 10% or more of their stock.

Respondents Philip Morris Products Inc. and Philip Morris Duty Free Inc. have the following parent corporation: Philip Morris International Inc. No other publicly held company owns 10% or more of their stock.

Respondent Philip Morris Latin America Sales Corporation has the following parent corporation: Philip Morris LA Holding Inc., f/k/a Philip Morris Latin America Inc. No other publicly held company owns 10% or more of its stock.

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Nothing in *Pasquantino v. United States*, 125 S. Ct. 1766 (2005)—which addressed solely the application of the Revenue Rule in a *criminal* wire fraud prosecution by the *United States*—provides any reason to grant review here. The United States Court of Appeals for the Second Circuit anticipated *Pasquantino* as early as 1997 in recognizing that the Revenue Rule does not bar such criminal prosecutions. App. 12a (citing *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997)). In applying the Revenue Rule here, the Second Circuit distinguished the criminal context from this case, where *foreign governments* have brought *civil lawsuits* to collect foreign taxes and obtain related relief. App. 11a-12a. The United States recognized this same critical distinction between criminal and civil cases when it expressly argued in *Pasquantino* that the Revenue Rule does not apply in the criminal context but does bar civil cases identical to those here. Brief for the United States at 15 n.4, *Pasquantino v. United States*, 125 S. Ct. 1766 (2005) (No. 03-725); *accord* Brief for the United States As Amicus Curiae at 6-7, *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 537 U.S. 1000 (2002) (No. 01-1317).

The Second Circuit's ruling applying the Revenue Rule in the civil context is consistent not only with *Pasquantino*, but with more than 200 years of case law from around the world and with every state and federal decision in this country, including two recent circuit decisions addressing the exact issues presented here. *See Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1256 (11th Cir. 2003); *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106 (2d Cir. 2001). The Court denied certiorari in both of these cases. *See Honduras*, 540 U.S. 1109 (2004); *Canada*, 537 U.S. 1000 (2002). The Court should do the same here.

In *Pasquantino*, this Court recognized that the Revenue Rule serves important separation-of-powers interests by avoiding judicial interference in the political branches' determination of whether, when, and how to allow a foreign government to enforce its tax laws in U.S. courts. *See Pasquantino*, 125 S. Ct. at 1779-80. In the context of federal prosecutions, however, these separation-of-powers interests are not implicated because such prosecutions "embod[y] the policy choice of" the Executive and Legislative branches of government—and therefore "pose[] no risk of advancing the policies" of a foreign government illegitimately. *Id.* at 1780. By contrast, where, as here, a foreign government brings a civil action to vindicate its foreign tax laws, there is no Executive Branch "safeguard," *id.* at 1779, and the Rule applies to prevent a foreign government from circumventing the treaty process and obtaining greater assistance than it has negotiated for and greater assistance than the United States would receive in foreign courts. Indeed, applying the Revenue Rule is especially necessary here because petitioners assert *state law* claims that, if upheld, would allow fifty separate state law regimes to inject themselves into matters of foreign relations, compounding exponentially the very problems that the Rule is designed to prevent.

In view of the unanimity of the federal circuit courts, the United States's agreement with these decisions, the reasoning of *Pasquantino*, and this Court's two prior denials of certiorari, this Court should deny the Petition.